Supreme Court, U.S.
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Supreme Court of the United States

FIRST NATIONAL BANK OF MILACA,
Petitioner,

v.

MELANIE BENJAMIN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a tribe attempts to resurrect a reservation that nonmembers justifiably believed long disestablished, by asserting sovereign authority over the former reservation, can a nonmember doing business within the former reservation boundaries seek declaratory relief concerning those boundaries only when the tribe has sought to enforce its regulations over that nonmember business?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29(6) Petitioner First National Bank of Milaca states that it is a family-owned, closely-held corporation with no parent company, and no publicly-held corporation owns ten percent or more of the Bank's stock.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

1) Petitioner First National Bank of Milaca;

2) Petitioner County of Mille Lacs, Minnesota;

3) Respondent Melanie Benjamin, individually and officially as Chief Executive, Mille Lacs Band of Chippewa Indians;

4) Herb Weyaus, individually and officially as Secretary/Treasurer, Mille Lacs Band of Chippewa Indians;

5) Sandra Blake, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians;

6) Marvin Bruneau, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians;

7) Harry Davis, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians.

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PETITION FOR WRIT OF CERTIORARI

Petitioner First National Bank of Milaca petitions this Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's opinion (9a-27a) is reported at 262 F. Supp. 2d 990 (D. Minn. 2003). The Eighth Circuit's opinion (1a-8a) is reported at 361 F.3d 460 (8th Cir. 2004). The order of the Eighth Circuit denying the petition of First National Bank of Milaca for rehearing and for rehearing en banc (28a) is unreported.

JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because this case seeks declaratory relief regarding federal Indian treaties and acts of Congress. The district court's judgment was entered on May 7, 2003 and was timely appealed to the Eighth Circuit on June 5, 2003. The judgment of the Eighth Circuit was entered on March 9, 2004. The Eighth Circuit denied a timely petition for rehearing and for rehearing en banc on May 19, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. III, § 2;

28 U.S.C. § 2201.

Certain treaties between the United States and the Chippwas and certain statutes promulgated by the Mille Lacs Band are found in the Appendix at 29a-56a.

STATEMENT OF THE CASE

The fundamental issue underlying this case is whether an Indian reservation established in 1855 and extinguished by plain treaty language eight years later continues to exist. Petitioners First National Bank of Milaca ("Bank") and the County of Mille Lacs ("County") believe that the reservation was formally disestablished by subsequent treaties, and that any provisional right of Respondents' ancestors to avoid compulsory removal from the former reservation was extinguished in subsequent negotiations authorized by Congress. As stated in its brief *amicus curiae* to the Eighth Circuit in this matter, the State of Minnesota concurs fully in that position. (*See* App. 59).[1] Respondents, leaders of the Mille Lacs Band of Chippewa (Ojibwe), maintain that the reservation was never disestablished, if for no other reason, some decendants of Band members have continued to live within the boundaries of the original reservation up to the present. (*See* App. 406-407, 411, 422).

In 1855 the United States signed a treaty with the Mississippi Bands of Chippewa creating for them six reservations in northern Minnesota. Treaty of Feb. 20, 1855, 10 Stat. 1165 (App. 7-13). One of these reservations comprised approximately 61,000 acres in three townships on the south shore of Mille Lacs Lake in north central Minnesota. *Id.* By 1863, however, after the 1862 Sioux uprising in southern Minnesota and a lesser known Chippewa uprising that same year, the Interior Department revised its reservation policy with the Mississippi Chippewa. *See* H.R. Ex. Doc. No. 68, 37th Cong., 3d Sess. at 3-4 (1863); H.R. Ex. Doc. No. 1, 38th Cong., 1st Sess. 1182 at 149-150 (1863); *see also* Rebecca Kugel, TO BE THE MAIN LEADERS

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[1] Cites to the Bank's Supreme Court Appendix are designated as (__a), whereas cites to the Bank's Eighth Circuit Appendix are designated as (App. ____).

OF OUR PEOPLE A HISTORY OF MINNESOTA OJIBWE POLITICS 1825-1898, 77-80 (1998).

That year the federal government negotiated a new treaty with the Mississippi Chippewa that ceded the six reservations created by the 1855 Treaty and removed the Mississippi Chippewa to a single reservation farther north and more remote from white settlements. March 11, 1863 Treaty between the United States and the Chippewa Indians, 12 Stat. 1249 (29a-36a). The federal government also negotiated a second treaty in 1864 that likewise ceded the reservations established by the 1855 Treaty. May 7, 1864 Treaty between the United States and the Chippewa Indians, 13 Stat. 693 (37a-42a).

The provision ceding the reservations created by the 1855 Treaty was straightforward :

> The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the 22d February, 1855, are hereby ceded to the United States.

(30a, Article I) (38a, Article I) (emphasis added).

Language such as this has been held "precisely suited" to extinguish a reservation. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 592 (1977), *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (specific cession language overrode savings clause). Similarly, Respondents have not asserted in this litigation that the language of cession in Article I was ambiguous or that the plain meaning of these words of cession could not be understood by the Chippewa negotiators.

The federal government viewed these treaties as terminating the Mille Lacs Reservation. Reporting on the 1863 Treaty, the Secretary of the Interior wrote Congress:

> As this treaty has been published, I deem it unnecessary to allude to its provisions further than to state, that by its terms the reservations at Gull lake, Mille Lac, Sandy lake, Rabbit lake, Pokagomin lake, and Rice lake, are ceded to the United States, and a new reservation established in the vicinity of and including the reserves of the Pillager and Lake Winnibigoshish bands for the Indians of the reservations ceded . . . .

H.R. Ex. Doc. No. 1, 38th Cong., 1st Sess. 1182 at 150 (1863).

While there can be little doubt that the 1863 and 1864 Treaties extinguished the Mille Lacs Reservation as a juridical entity, current Band members assert that it continues to exist. (App. 406-407, 411, 422). In large part their claim is based on the following proviso found in Article 12 of both the 1863 and 1864 Treaties:

> Provided, that owing to the heretofore good conduct of the Mille Lacs Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner protest the persons or property of the whites.

(34a, Article 12) (41a-42a, Article 12). The "good conduct" referred to in the proviso was apparently the Mille Lacs Band's open opposition to the uprising fomented by other Chippewa in 1862. *See* H.R. Ex. Doc. No. 148, 48th Cong., 1st Sess. 2207 at 4 (1884).

Familiar Nineteenth Century forces, *see DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425, 431 (1975), were at work in Mille Lacs County, where the former reservation was located. Soon after cession, settlers and loggers pressed to move onto the former reservation land. *See, e.g.*, H.R. Ex. Doc. No. 148, 48th Cong., 1st Sess. 2207 at 8 (1884). By 1877 the Secretary of the Interior was

compelled to resolve the validity of a settler's claim to a parcel within the former Mille Lacs reservation. *Id.* The Secretary determined that the claim was valid because the reservation had been ceded, and all the Mille Lacs Band retained was a reprieve from forced removal:

> Under this proviso [referring to proviso of the twelfth article of the treaty of 1863] it is true that, so long as said Indians do not interfere with the persons or property of the whites, they cannot be compelled to remove; but it by no means gives them an exclusive right to the lands, nor does it, in my judgment, exclude said lands from sale and disposal by the United States.

Id. (emphasis added). The Secretary concluded that the Mille Lacs "might remain, not because they had any right to the lands, but simply as a matter of favor." *Id.* Although the Secretary determined that the claim was valid, he suspended the decision because there were still Mille Lacs Band members residing on the former reservation. *Id.*

The federal government never formally exercised its right to remove the members of the Mille Lacs Band (or members of other Chippewa bands) that continued to live near Mille Lacs Lake. This lead to uncertainty over the validity of entries that white settlers had made on "about 55,000 acres, or approximately nine tenths of the lands, ..." *United States v. Mille Lac Band*, 229 U.S. 498, 502-503 (1913). To resolve the validity of these entries, Congress passed the Nelson Act, ch. 24, 25 Stat. 642 (1889). This act was intended to address the status of various reservations in Minnesota and to secure, so far as possible, the consolidation of the various Chippewa Indians onto two reservations in northern Minnesota. *Id.*

The Nelson Act empowered the President to appoint three Commissioners, who were charged with one directive:

> to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes . . . .

Nelson Act at § 1.

After extensive negotiations, the Commissioners and the Mille Lacs Band reached an agreement, namely, that the Mille Lacs Band would relinquish its right of occupancy:

> We, the undersigned, being male adult Indians over eighteen years of age, of the Mille Lac band of Chippewas of the Mississippi, occupying and belonging to the Mille Lac Reservation under and by virtue of a clause in the twelfth article of the treaty of May 7, 1864 (13 Stat. at L. p. 693) do hereby certify and declare that we have heard, read, and interpreted and thoroughly explained to our understanding the act of Congress approved January 14, 1889 . . . and <u>do hereby forever relinquish to the United States the right of occupancy on the Mille Lac Reservation reserved to us by the twelfth article of the treaty of May 7, 1864</u> . . . .

H.R. Ex. Doc. No. 247, 51st Cong., 1st Sess. at 45-46 (1890) (emphasis added).

Following these negotiations the Mille Lacs Band claimed they did not get the compensation the Nelson Act provided for their concessions. Congress waived sovereign immunity to allow the Court of Claims to hear their

contention. 35 Stat. 619 (1909). Losing in that forum, the government appealed to this Court, which held that no rights of the Mille Lacs Band had been infringed when Congress validated the land entries made prior to the Nelson Act:

> We are accordingly of opinion that the act of 1889, to which the Indians fully assented, contemplated and authorized the completion, and the issuing of patents on, all existing pre-emption and homestead entries in the Mille Lac tract which, in the course of proceedings in the Land Department, should be found to be within the terms of the proviso to § 6, and therefore that no rights of the Indians were infringed in so disposing of lands embraced in such entries.

229 U.S. at 508-09 (emphasis added).

In so holding, the Court rejected two of the Band's contentions: 1) the Band did not understand the terms of the Nelson Act; and 2) the Mille Lacs area was still a reservation after the 1863 and 1864 Treaties. *Id.* Both determinations were an essential part of the Court's holding. *Id.* To reach this holding, the Court had also to hold that the Mille Lacs Reservation had been extinguished before the Nelson Act, *i.e.*, by the 1863 and 1864 Treaties.

Today approximately 90% of the land within the former reservation is owned by non-members. (App. 343-51). The Census Bureau shows that the vast majority of the population within the former reservation is non-Indian and that the Indian population is concentrated primarily in one township. (App. 337-342). These characteristics bear the hallmark of a disestablished reservation. *See Yankton Sioux Tribe*, 522 U.S. at 356-57.

Despite its historical roots, this dispute arises out of recent efforts of Band leaders to recreate the former 61,000 acre reservation. In 1989 then Chief Arthur Gahbow delivered a State of the Band address in which he declared:

> There must be some divine plan the Great Spirit has for us as a people. From the time I took office 16 years ago, until recently I was not sure what that plan was. But I don't think it was divine intervention, it was more common sense and a sense of injustice that made me arrive at this conclusion about the land.
>
> That conclusion is this: We will take it back! We have been on the defensive for 100 years.
>
> I tell you this day, this hour, this moment in history we are no longer just holding our ground. As of right now we are on the offensive. We are on the attack
>
> To state simply, we will take it back.
>
> * * *
>
> For now let the word go forth from this time and place, the state of this Band is sound and let friend and foe alike know that we are on the offensive.
>
> We will not back down. We are on the attack. There is no retreat. There is no surrender.

(App. 32, 46).

Gahbow's successor, Marge Anderson, echoed this approach in her 1998 State of the Band speech:

> As Abraham Lincoln once said, 'If I had eight hours to chop down a tree, I'd spend six sharpening my ax' . . . [t]he Band has been good at determining when its ax is sharp enough. And when we make that determination, we don't wait a minute longer.

(App. 314).

The Gahbow declaration was followed by an aggressive course of action in dealing with businesses within the former 1855 reservation. In 1992, the Band wrote to businesses within that area, announcing the Band's plan to require all businesses operating within the boundaries of the former reservation to be licensed by the Band. (60a-61a). A similar letter was circulated more recently and also claims that all businesses operating within the Band's territory are required to obtain a Band business license. (62a-63a).

As part of its now declared plan to reclaim the old reservation in full, the Band has enacted an extensive series of statutes, most codified in a two volume set published as the Mille Lacs Band Statutes Annotated. (*See, e.g.*, 43a-56a; *see also* App. 60-307). These Band ordinances establish a comprehensive series of business regulations from land use to banking. *See id.* In their motion to dismiss, Respondents asserted evidence which they claim shows that those ordinances apply only to businesses which consent to do business with the Band. This assertion was a patent ploy to avoid judicial resolution of the boundary dispute. Band officials did not dispute that the Band's ordinances and letters apply on their face to the Bank where the Band claims power to regulate – the former 1855 reservation. (App. 424-426; *see also* App. 408, 412, 417).

Respondents also did not dispute that these ordinances apply to the Bank. Nor could they do so, for Molly Big Bear, who is in charge of the Band's licensing program, established the program applies throughout the former 1855 reservation and embraces anyone who does business with Band members, including banks.

Q: "What is your understanding of the description of within the boundaries of tribal territories? . . . "

A: "The 1855 boundaries."

(App. 422).

Q: "So is it fair to say that under section 101 [18 MLBSA § 101] the corporate commission has the power to license anyone who wishes to provide goods or services to any member of the Mille Lacs Band?"

A: "Yes."

(App. 426; *see also* App. 423).

Q: "This sentence [of 18 MSBSA § 101] makes reference to goods or services of any material value, doesn't it?"

A: "Yes."

* * *

Q: "Would you agree that banking services are covered by the word services in [the first sentence of 18 MLBSA § 101]?"

A: "Yes."

Q: "Is there any exemption from licensing for banks in this chapter two, the licensing provisions?"

A: "No."

(App. 425).

The Band has also advanced its legal interpretation of the 1863 and 1864 Treaties to convince various federal agencies of the continued existence of the 1855 reservation. (App. 413-416). For example, EPA has granted the Band treatment-as-state status over the entire 1855 boundary area, which means the Band can enforce federal environmental rules within the Bank's market area. *Id.* The Band has also convinced the United States Department of the Interior that the former reservation still exists (App. 352-359) and that the Band retains taxation authority over non-members (App. 324-325).

This case ripened into a lawsuit after the County – in opposition to the Band's contention – refused to recognize the existence of the former 1855 reservation boundaries and instead brought an action for declaratory relief. The relief the County sought was a declaration that the boundaries established by the former 1855 reservation had been disestablished.

The Bank intervened in the County's case because its settled expectations were that the Mille Lacs reservation created by the 1855 Treaty with the Chippewa has long been disestablished. Founded in 1897, the Bank is a small, independent business of the Allen family. (57a). The Bank is a federally chartered bank based in Milaca, Minnesota, the county seat of Mille Lacs County. *Id.* The Bank has a branch in Isle, Minnesota, in Isle Harbor Township, Mille Lacs County. *Id.* The Isle branch represents approximately one-third of the Bank's loans and deposits. (58a). For example, the Isle branch of the Bank has 189 loans totaling approximately $11,000,000 secured by real estate. *Id.* A major portion of these Isle branch loans are secured by real estate located in Kathio, South Harbor and Isle Harbor Townships, *id.*, the townships that once comprised the 1855 reservation.

At a minimum, the Bank wanted the boundary issue determined, for the resulting uncertainty has had an impact on the Bank's assets. Indeed, the specter of Band regulation poses significant operational concerns to the Bank, because the Band in its statutes has asserted enforcement authority over federal banking laws and UCC Article Nine secured creditor remedies. (67a-68a). For example, one such provision states:

> Any creditor be they a person, company, corporation, association, partnership, cooperative, utility and any other public or private commercial entity, who absent a lawful order from the Court of Central Jurisdiction,

> who shall attempt to remove or disconnect any property from any person under the jurisdiction of the Band, shall be deemed to have committed a property trespass offense in violation of 2 MLBSA § 304(m) and the Solicitor General shall initiate civil action against said person seeking their removal and exclusion from lands under the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians for a period not to exceed 180 days.

24 MLBSA § 3309 (53a).

Moreover, because the Bank has Band members as customers, under Band statutes, any Band member doing business with the Bank could take the Bank to tribal court for alleged violations of the Truth in Lending Act, for example, or violations of Article Nine of the U.C.C. 24 MLBSA §§ 2, 3, 4, 5, 6, 3309, 3501-3510 (1996) (51a-56a); *see also* 5 MLBSA §§ 111, 113 (1996) (43a-44a; App. 382).

Nor is the Band's assertion of regulatory authority limited to commercial activities. Its environmental statute regulates activities within the former reservation. (45a-47a; App. 208-293). Unsurprisingly, the boundary dispute is now a realtor disclosure item for homes sold within the former reservation. (App. 371; *see also* App. 387).[2] The Band has also told homeowners in the disputed area they are subject to the Band's tribal authority. (76a-82a).

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[2] This real estate disclosure is given pursuant to Minn. R. 2805.1400, which states "[l]icensees shall disclose to any prospective purchaser all material facts pertaining to the property, of which the licensee is aware, which could adversely and significantly affect an ordinary purchaser's use or enjoyment of the property, or any intended use of the property of which the licensee is aware." Minn. R. 2805.1400, subp. 3 (2003) (emphasis added).

Recognizing the concrete stake the Bank has in determining the status of the former reservation boundaries, Magistrate Judge Erickson issued an order allowing the Bank to intervene. (83a-87a). Magistrate Erickson relied heavily on the Eighth Circuit's decision in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993), which the Magistrate found controlling. (86a). Magistrate Erickson noted that the intervenor landowners in the *Mille Lacs Band* decision were allowed to intervene because their property values could be adversely affected if the Mille Lacs Band succeeded in acquiring treaty hunting and fishing rights over that region. *Id.* Hence, Magistrate Erickson concluded that the *Mille Lacs Band* decision compelled the Bank's intervention because "FNB not only owns property within the 'former' Reservation boundaries, but also has a legal interest, through loans, in a large amount of the property that could be affected by the disposition of this litigation." *Id.*

The district court, however, determined the dispute between the Bank and Respondents over the Band's attempt to resurrect the former 1855 reservation and to enact regulations facially applicable to the Bank did not present a justiciable controversy. (15a-27a). Although the district court acknowledged that "[i]f the Band's tribal authority covers the full extent of the 1855 reservation, it might well alter private and public sector relationships in the Mille Lacs area," (26a), the district court determined that absent actual enforcement of the Band's statutes, the Bank lacked standing and the issue was not ripe. (15a-27a).

The district court reached this conclusion on the mistaken premise that the Bank is generally foreclosed from maintaining a declaratory action in the absence of infringement on the right to free speech or some other fundamental right. (17a). The district court also side-stepped the Bank's evidence of actual harm to the value of its business, its property and its security interests. (21a-22a).

Instead, the district court substituted its own judgment in place of the factual record and concluded that property values in the Mille Lacs region had been unaffected by the Band's reassertion of reservation boundaries. (22a).

Agreeing with the district court, the Eighth Circuit determined that the Bank's argument was mere speculation and that the Bank failed to establish proof of injury sufficient to withstand summary judgment. (5a-6a). The court did so despite record evidence establishing present harm to the Bank and its business from the controversy, irrespective of whether the Band had acted to enforce its ordinances against the Bank. *Id.* This evidence included, among other things, an affidavit from the Bank's Chairman stating "[t]he Band's assertion of regulatory authority over property the Bank owns or on which it holds a security interest will depress the market value of that property." (58a). Additionally, the Bank's Chairman stated in a separate affidavit:

> One important aspect of extending credit is the Bank's ability to perfect its security interest in loan collateral. The Bank's ability to perfect security interests and to exercise creditor remedies will be directly affected by the existence or nonexistence of the disputed reservation boundaries. The Bank is concerned that it might be subject to tribal court jurisdiction for lending activities with members of the Mille Lacs Band. The Bank does not want to be subject to tribal court jurisdiction, and the Bank does not want to be deprived of any rights or remedies it is granted under Minnesota's version of the Uniform Commercial Code. If the Bank is deemed to be under tribal court jurisdiction, its ability to enforce its rights as a secured creditor will be impacted regardless of whether the borrower is a Bandmember or not.

(67a-68a). The Bank's Chairman further expressed concern about the federal laws that regulate its day-to-day operations

and the need to "know with certainty where and how these laws will be enforced and applied to manage its banking activities." (68a).

Despite this and other evidence, the Eighth Circuit apparently afforded the district court's dismissal "unique and substantial discretion." (5a). Discretion, however, had no place in review of this case because the abuse of discretion standard of review only applies to review of a district court's actual exercise of discretion under the declaratory judgment act. *Federal Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 963-64 and n.3 (D.C. Cir. 1995). Here, the district court did not dismiss the case based on discretionary or prudential considerations, but made a legal ruling that neither the Bank nor the County had standing. Similarly, the Eighth Circuit failed to cite any prudential consideration warranting dismissal. Notwithstanding its reference to discretion, the Eighth Circuit's decision rested solely on a finding that the Bank failed to adduce sufficient evidence of injury, *i.e.*, there was no standing. (5a-6a).

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS THE IMPORTANT FEDERAL QUESTION OF WHEN A NON-INDIAN PARTY MAY CHALLENGE THE EXISTENCE OF TRIBAL POWER TO REGULATE NON-INDIANS

The question whether the Mille Lacs Band has a reservation within which it has authority to regulate businesses activities is ready to be decided. The issue turns on the effect of specific treaties, which either did or did not disestablish the 1855 Mille Lacs Reservation. The issue depends on historical fact, not some future event. Nothing more needs to be done to define this dispute. As a business within the disputed area and directly affected by the Band's present assertion of legislative power, the Bank has a sufficiently concrete interest in the dispute to have standing to obtain a judicial resolution of whether the Bank is

answerable to Band authority for the Bank's activities within the disputed area.

This Court has consistently held that cases requiring no further factual development are particularly amenable to review. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 81-82 (1978) (case ripe if further factual development would not "significantly advance [the Court's] ability to deal with the legal issues presented nor aid [the Court in its] resolution."); *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Here, neither the district court nor the Eighth Circuit disputed that the issue is primarily legal, nor did those courts identify any further factual development necessary to resolve the reservation question. Indeed, the language ceding the Mille Lacs Reservation in the 1863 and 1864 Treaties is unambiguous. Likewise, it is undisputed that the Nelson Act accomplished the elimination of the Mille Lacs Band's vestigial and provisional right to remain. Nothing in today's factual record can change those key facts.

In the context of boundary disputes, declaratory judgment actions are especially appropriate because the court need do nothing more than apply existing relevant case law to specific treaty language. This Court and other courts have exercised jurisdiction over declaratory judgments in boundary disputes where the relief sought focused on the status of reservation boundaries. *See, e.g., Rosebud Sioux Tribe v. Kneip*, 375 F. Supp. 1065, 1066 (D.S.D. 1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977) (plaintiffs sought a declaration that "three specific acts of Congress did not diminish the Rosebud Sioux Reservation or alter its boundaries from those defined in the act of March 2, 1889."); *City of New Town, N.D. v. United States*, 454 F.2d 121, 122 (8th Cir. 1972) (declaratory judgment procedure used to determine whether the reservation boundaries continued to exist).

This case, like other boundary disputes, is amenable to judicial resolution precisely because no further factual development is necessary to crystallize the legal issue for determination. As in *Rosebud* and *New Town*, there is a real, concrete dispute between the parties. In *Rosebud* this Court affirmed a declaratory ruling that addressed only the issue of whether the boundaries of a former reservation remained intact. 430 U.S. at 585 ("[i]n June 1972 the Rosebud Sioux Tribe sued in the United States District Court for the District of South Dakota to obtain a declaratory judgment that the original boundaries of their reservation, as defined in the Act of March 2, 1889, 25 Stat. 888, had not been diminished by three subsequent Acts of Congress . . ."). *Rosebud* did not involve a member who had been arrested, charged civilly, or otherwise subjected to state jurisdiction. *Id.* Rather, the tribe and state had a disagreement over the existence of the reservation boundaries and the tribe brought the case for declaratory relief about the status of the reservation boundaries. *Id.*

The issue here is on all fours with *Rosebud*. The Bank and County contend that the reservation established by the 1855 Treaty has been disestablished. Band officials maintain that the boundaries of the reservation created by the 1855 Treaty continue in legal effect; they also claim power to regulate activities within the boundaries of the reservation created by the 1855 Treaty. The federal courts, including this Court, did not hesitate to exercise jurisdiction in *Rosebud*, and there should have been no hesitation here.[3]

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[3] Similarly, in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), although this Court dismissed the case on Eleventh Amendment immunity grounds, this Court did not question the Article III standing of a tribe to seek declaratory relief about the status of reservation boundaries and the effect on title to Lake Coeur d'Alene.

In *New Town* the district court granted declaratory relief and the Eighth Circuit affirmed the declaratory relief where the sole issue was the status of a reservation boundary. 454 F.2d at 123. As in *Rosebud*, the *New Town* case did not involve any specific controversy or dispute other than whether the reservation continued to exist. *Id.* Although one tribal member had been arrested some eight years prior to the time the *New Town* case was brought, the real catalyst for the action was the issuance of an opinion from the Solicitor for the Department of the Interior which "concluded that the 1910 Act had not altered the boundaries of the reservation . . . ." *Id.* That is the exact situation here. The Mille Lacs Band has convinced the Solicitor of the Department of the Interior to issue an opinion that the 1855 reservation boundaries remain intact. The Band has also convinced the EPA to grant it treatment as a state status on the grounds that the 1855 reservation still exists and the Mille Lacs Band, therefore, retains jurisdiction over that region.

The case of *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) is also instructive. There, tribal, federal and state officials had a "disagree[ment] as to the environmental regulations applicable to a proposed waste site." *Id.* at 340. Although the tribe initially sought injunctive relief, the injunction issue was abandoned on appeal, and the sole issue presented for review was the status of the reservation boundaries. *Id.* at 341. As in *Rosebud*, this Court did not hesitate to grant certiorari to resolve the reservation boundary question. *Id.* at 341-42; *accord Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809, 812 (8th Cir. 1983) (exercising jurisdiction over an action involving "a dispute between the State of South Dakota and the Lower Brule Sioux Tribe over which of them will regulate hunting and fishing activity at the Fort Randall and Big Bend dam and reservoir projects."). Like the relief sough in the *Yankton Sioux Tribe* case, the Bank here seeks relief to determine who

has jurisdiction within the disputed region, which turns on the status of the reservation boundaries.

These cases illustrate that there need not be, as the district court and Eighth Circuit would require here, actual enforcement of tribal regulations before a party may challenge a tribe's assertion of jurisdiction. When the dispute crystallizes into a disagreement over the existence of reservation boundaries and the tribe's authority over the reservation, the federal courts have jurisdiction to resolve the dispute.

Indeed, the federal circuit courts have consistently recognized that a party may maintain a pre-enforcement action when a tribe asserts regulatory authority over the party. For example, in *Baker Electric Co-op, Inc. v. Chaske*, 28 F.3d 1466 (8th Cir. 1994), the Devils Lake Sioux Tribe enacted a tribal utilities code, asserting regulatory authority within the historic boundaries of the Devils Lake Sioux Indian Reservation. *Id.* at 1470. In response to the enactment of the utilities code, Baker Electric Cooperative and Sheyenne Valley Cooperative brought suit against members of the tribal utilities commission seeking declaratory and injunctive relief. *Id.* The Devils Lake Band moved for dismissal on the basis that the tribal utilities code had never been enforced. *Id.* at 1471.

The court squarely rejected the argument that pre-enforcement suits regarding tribal ordinances are improper:

> we reject the Tribe's contention that officer suits are inappropriate where the officers have not acted. The RECs seek to enjoin the members of the Tribal Utilities Commission from enforcing the Tribal Utilities Code, and therefore their suits are squarely of the type recognized and approved of by this court in *Northern States Power*.

Id. (citation omitted). The Bank's circumstances and the relief sought here are indistinguishable from the circumstances and relief the utilities sought in *Baker Electric*.

Similarly, in *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458 (8th Cir. 1993), the utility brought a pre-enforcement action to enjoin a tribal ordinance that on its face regulated shipments of nuclear materials over reservation lands. *Id.* at 459-60. In the district court the tribe argued that the court should not enter injunctive relief because the tribe did not really intend to enforce its ordinance according to its terms and was willing to enter into a cooperative agreement with the utility. *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 781 F. Supp. 612, 616 (D. Minn. 1991). Thus there was really no harm. *Id.*

The district court flatly rejected this argument: "[s]o long as the Tribal Council has authority to enforce the ordinance 'to the letter,' the court must assume the Tribal Council will do so and analyze the effect of the ordinance as written." *Id.* The Eighth Circuit affirmed the district court's conclusion on appeal. *Northern States Power*, 991 F.2d at 463 ("[t]he district court simply assumed that the tribe would enforce the ordinance as written and refused to speculate that the tribe and NSP might someday enter into negotiations and agree upon a less burdensome regulatory scheme."); *see also Wisconsin v. Baker*, 698 F.2d 1323, 1326 (7th Cir. 1983) (declaratory judgment action initiated against tribal officials only three days after tribal ordinance enacted); *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okla.*, 725 F.2d 572, 574-75 (10th Cir. 1984) (allowing pre-enforcement challenge to tribal ordinances).

The vague assurances made by Band officials in this case are no different than the vague assurance made by the tribe in *Northern States Power*. Here, Band officials argued, and the district court agreed, that because Band officials only intend

to enforce their statutes to the extent allowed by federal law and because federal law restricts a tribe's ability to enforce statutes against non-members, the Bank had really suffered no harm in the absence of actual enforcement. (18a & n.8). If, however, the Bank knew for certain that it was not located within a reservation, the reach of tribal authority over the Bank would not be in question. *Cf. Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001) ("An Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than tribal land."); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091-92 (8th Cir. 1998) (no tribal jurisdiction exists outside the boundaries of a reservation). The Band has asserted the reservation exists and has enacted a panoply of laws to regulate business activity within the former reservation, including banking.

The Eighth Circuit's decision here conflicts with *Baker Electric*, *Northern States Power*, *Wisconsin v. Baker* and *Tenneco Oil*, which the court simply ignored. Strikingly, the Eighth Circuit also ignored its own decision in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993). *Mille Lacs Band* involved whether the Band had rights under an 1837 treaty to hunt and fish in an area within Minnesota that included Mille Lacs County. *Id.* at 996. On appeal from the district court's denial of intervention, the Eighth Circuit held that because the landowner intervenors had interests in property located within the area where the Band was asserting hunting and fishing rights and because those property interests could be adversely affected by the Band's actions, the intervenors had a legally protectable interest. *Id.* at 998.[4] In reversing the denial of intervention,

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[4] Tellingly, the federal magistrate in this case recognized that the *Mille Lacs* decision was directly on point and concluded that that decision compelled a ruling allowing the Bank to intervene. (86a).

the Eighth Circuit observed "the result of the litigation also may affect the proposed intervenors' property values." *Id.* at 998. That observation, made in granting the property owners party status, certainly supports the Bank's standing here, where more concrete harm was shown. More startling is the lower court's complete failure to address its own precedent.

For the Bank, whether the 1855 reservation continues to exist today as a juridical entity within which the Mille Lacs Band has broad regulatory authority is no theoretical issue or law school faculty debate. Resolution of the reservation boundaries will have meaningful effect because a decision on the merits will remove any uncertainty over whether there is still a 61,000-acre reservation in the middle of Minnesota where the Band has any authority to act. The Bank has taken out mortgages within the former reservation. It loans money to customers within that area and its customers include Band members.

On their face, Band regulations currently apply to the Bank, and any Band member that has a credit dispute could haul the Bank into tribal court today if the 1855 reservation continues to exist. For example, the Band has asserted jurisdiction over TILA claims by incorporating 15 U.S.C. § 1601 *et seq.* into 24 MLBSA § 5 (51a-52a) and asserting jurisdiction over all such claims "located on lands subject to the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians." 24 MLBSA § 2 (51a). The Band has enacted a similar provision that purports to grant the Mille Lacs Band Tribal Court exclusive jurisdiction over claims arising under the Uniform Commercial Code and Minnesota consumer protection laws on lands subject to the jurisdiction of the Band. 24 MLBSA §§ 2, 4, 5 and 6 (51a-52a). If valid, the Bank's right to enforce its Article Nine remedies is presently circumscribed. *See* 24 MLBSA § 3309 (requiring tribal court order to repossess collateral) (53a). This alone should be sufficient to confer standing on the Bank to determine whether or not the reservation continues to exist.

If it does, the Bank may be answerable to tribal court and needs to plan accordingly.

The Band's patent assertion of authority to regulate businesses within the claimed reservation puts the Bank in a tenuous position. Exactly how tenuous is shown by *Williams-Willis v. Carmel Financial Corp.*, 139 F. Supp. 2d 773 (S.D. Miss. 2001). In *Williams-Willis*, the plaintiff brought a Truth In Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, claim against a bank in tribal court. *Id.* at 774-75. The bank removed the case to federal court based on the federal question raised. In granting the plaintiff's motion to remand, the court held the action non-removable from tribal court, despite the federal TILA claim being asserted. *Id.* at 775-76.

The Bank also faces an issue over how it can enforce any security interests it might have with Band members. In *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983), a secured creditor attempted peaceable repossession of its collateral within the Navajo reservation. *Id.* at 590-91. The tribal court granted damages to the debtor on the ground that its tribal code barred such self help, an action two federal courts affirmed. *Id.* at 591. These cases demonstrate how reservation boundaries affect the Bank.

Other consequences flow from reservation status. For example, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, has been read to embrace tribal jurisdiction over non-members. 33 U.S.C. § 1377. Treatment as a state status is dependent on reservation status because 33 U.S.C. § 1377(h)(1) defines "federal Indian reservation" identically to "Indian Country" in 18 U.S.C. § 1151. Likewise, the National Historic Preservation Act, 16 U.S.C. § 470(a) *et seq.*, provides that a tribe may be able to assume "all or any part of the functions of a State Historic Preservation Officer in accordance with subsections (b)(2) and (b)(3) of this section, with respect to tribal lands, as such responsibilities may be modified for tribal programs through regulations issued by the Secretary . .

. . " 16 U.S.C. § 470a (d)(1)(C)(2). "Tribal lands," of course, are defined as "all lands within the exterior boundaries of any Indian reservation." 16 U.S.C. 470w(14)(a).

These jurisdictional grants are not merely hypothetical. The Band is asserting power over the Bank; it has also attempted to control the actions of private landowners solely because the land was within the former reservation. (76a-82a). Who controls land use affects land values. If the 1855 reservation exists, the Band can avoid county zoning entirely.[5] This increases the risk to the Bank that its collateral will be unexpectedly devalued. The issue of whether the 1855 reservation still exists could hardly be more concretely defined.

The district court and the Eighth Circuit skirted the issue by accepting the Band's argument that the Bank has no standing due to this Court's constraints on tribal authority over nonmembers. Yet it is no secret that numerous tribes are currently working to overturn this Court's decisions limiting tribal authority over nonmembers. *See, e.g.*, Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 2 (Spring 2003). In fact, recently in *United States v. Lara*, 124 S. Ct. 1628 (2004), this Court recognized Congress's power to overturn restrictions on tribal authority over nonmembers and affirmed tribal criminal jurisdiction over nonmember Indians. *Id.* at 1633.

Rather than acknowledge the reality of what is going on in this case, the district court and Eighth Circuit determined that the Bank failed to establish proof of injury sufficient to

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[5] Indeed, the Band disputes that it is subject to County zoning laws. (70a). The Band also claims it is immune from County taxation and pays its taxes only under protest (69a).

withstand summary judgment. Those courts did so despite evidence establishing present harm to the Bank and its business from the controversy, irrespective of whether the Band had acted to enforce its ordinances against the Bank. The Band's assertion of regulatory authority over property which the Bank owns or on which it holds a security interest should be sufficient to establish its standing to contest that potential jurisdiction. Moreover, the Band's regulatory scheme impacts the Bank's livelihood. (58a-59a; 67a-68a). Indeed, the specter of Band regulation poses significant operational concerns to the Bank, because the Band in its statutes has asserted enforcement authority over federal banking laws and U.C.C. Article Nine remedies. (67a-68a). Furthermore, because the Bank has Band members as customers, under Band statutes, any Band member doing business with the Bank could take the Bank to tribal court for alleged violations of the Truth in Lending Act, for example, or violations of Article Nine of the U.C.C.

More importantly, however, the district court and the Eighth Circuit failed to recognize the unique nature of an action like this. For more than a century, nonmember residents of Mille Lacs County considered the boundaries of the former 1855 reservation disestablished. Due to the Band's reassertion of juridical and sovereign authority over this region, residents and businesses within a 61,000 acre area are left in the precarious position of not knowing whether they live within an Indian reservation. Aside from the financial impact to the Bank and its security interests, the Band's assertion of juridical and sovereign authority in itself is injury enough to confer Article III standing.

This is also an issue that impacts nonmembers and members alike on a daily basis. Nonmembers have the right to know where they stand, and the federal courts should not hesitate to issue a declaratory ruling in a case like this. In the words of Justice Souter, "[t]he ability of nonmembers to know where tribal jurisdiction begins and ends, it should be

stressed, is a matter of real, practical consequence . . . ." *Nevada v. Hicks*, 533 U.S. 353, 383 (2001) (Souter, J. concurring) (emphasis added).

Where, as here, a tribe attempts to resurrect long disestablished reservation boundaries, nonmembers living and doing business within those boundaries should have access to the federal courts to obtain declaratory relief concerning the tribal claim. The situation here is similar to the situation in *Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139 (2d Cir. 2003), *cert. granted*, 124 S. Ct. 2904 (2004). There, this Court granted certiorari to resolve the status of a claimed reservation. *Id.* This is of little surprise as the Oneida Tribe there is attempting rewrite history to reclaim a 300,000 acre reservation in Central New York *Id.* Here, the Mille Lacs Band is attempting to rewrite history and reclaim a 61,000 acre reservation in the heart of Minnesota.

This Court should thus grant certiorari in this case to establish that what the Mille Lacs Band has done here is sufficient to confer Article III jurisdiction on the federal courts to resolve the dispute. The Mille Lacs Band has laid claim to and asserted jurisdiction over a 61,000 acre reservation in which the Bank is located, and the Bank seeks redress to establish that it is not subject to Band regulation by virtue of being within a reservation. Previously this Court and other federal circuit courts had addressed reservation boundary disputes when the issue was crystallized and concrete, as it is here. Granting certiorari will allow the Court to clarify that its precedent provides federal jurisdiction over a reservation boundary dispute brought by a litigant with a well defined interest in the outcome. Which sovereigns can regulate a business is an issue of such importance that those private businesses affected should not have to wait for a tribal court summons. The Bank should have the right now to challenge the Band's attempt to "take it back."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 17, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

[Filed: March 9, 2004.]

No. 03-2527, 03-2537.

COUNTY OF MILLE LACS,
Plaintiff—Appellant,
FIRST NATIONAL BANK, OF MILACA,
Intervenor Plaintiff,

v.

MELANIE BENJAMIN, individually and officially as Chief Executive, Mille Lacs Band of Chippewa Indians; HERB WEYAUS, individually and officially as Secretary/Treasurer, Mille Lacs Band of Chippewa Indians; SANDRA BLAKE, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; MARVIN BRUNEAU, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; HARRY DAVIS, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians,
Defendants—Appellees,

STATE OF MINNESOTA; STATE OF SOUTH DAKOTA,
Amicus on Behalf of *Appellant*.

COUNTY OF MILLE LACS,
Plaintiff,

FIRST NATIONAL BANK, of MILACA,
Intervenor Plaintiff—Appellant,

v.

MELANIE BENJAMIN, individually and officially as Chief Executive, Mille Lacs Band of Chippewa Indians; HERB WEYAUS, individually and officially as Secretary/Treasurer, Mille Lacs Band of Chippewa Indians; SANDRA BLAKE, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; MARVIN BRUNEAU, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; HARRY DAVIS, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians,
Defendants—Appellees,

STATE OF MINNESOTA, *Amicus* on Behalf of *Appellant*.

Rehearing and Rehearing En Banc Denied May 19, 2004.

Before RILEY, BOWMAN and SMITH, *Circuit Judges*.

SMITH, *Circuit Judge*.

County of Mille Lacs ("County") and the First National Bank of Milaca ("Bank"), appeal from an order of the district court dismissing their action seeking to determine the legal status of the boundaries of the Mille Lacs Band of Chippewa Indians ("Band") reservation. We affirm.

I.

The facts for this case extend back nearly 170 years. The district court opinion described them well, and we will not recapitulate them all. *County of Mille Lacs v. Benjamin*, 262 F.Supp.2d 990 (D.Minn.2003). Relevant to this appeal, the appellants brought suit in federal court seeking declaratory relief regarding the boundary status of the Mille Lacs Indian Reservation. The County and the Bank contend that the reservation's boundary status is a critical issue to many residents in Mille Lacs County. The Bank alleges that the reservation's boundary status must be defined because the Band's assertion of regulatory authority over parts of the reservation's territory has had a negative effect on the value of the Bank's security interests. In the Bank's view, the Band's allegations of ownership and jurisdiction to parts of the reservation have harmed the Bank's economic interest.

The County contends that the uncertainty of the reservation's boundaries is detrimental to the County's ability to enforce laws and building and environmental permits that are directly dependent on the reservation's boundaries.

At the close of initial discovery, the Band moved for summary judgment on the following grounds: standing, ripeness, sovereign immunity, and indispensable party. The district court granted the Band's motion after determining that neither the Bank nor the County had standing to question the legal status of the reservation's boundaries. Also, the court determined that the present dispute was not ripe for adjudication. On May 7, 2003, the district court, in granting the Band's motion for summary judgment, dismissed the claim with prejudice. This appeal followed.

On appeal, the County and the Bank argue that they have suffered both threatened injury and present harms to their ability to plan and conduct business. Specifically, they allege numerous harms, including: greater regulatory oversight by

the EPA, limits on county and state regulatory authority, and expansion of the reach of tribal authority. Lastly, the appellants contend that the district court erred in dismissing the suit with prejudice because the dismissal was based on jurisdictional grounds. We consider each argument in turn.

II.

We review a district court's grant of summary judgment based on standing de novo. *Oti Kaga, Inc. v. S. Dakota Hous. Dev. Auth.*, 342 F.3d 871, 877 (8th Cir.2003) (citing *Nat'l. Fed'n. of the Blind of Mo. v. Cross*, 184 F.3d 973, 979 (8th Cir.1999)). Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). When ruling on a summary judgment motion, a court must view the evidence "in the light most favorable to the nonmoving party." *Oti Kaga, Inc.*, 342 F.3d at 877 (citing *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 962-63 (8th Cir.1997)).

A. *Standing*

Federal courts only have jurisdiction to hear actual cases and controversies. U.S. Const. art. III, § 2, cl. 1. "[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). The controversy must be definite and concrete, touching the legal relations of parties having adverse *legal* interests. *Nat'l Fed'n of the Blind of Mo.*, 184 F.3d at 979 (emphasis added). A party must satisfy constitutional standing requirements for its case to proceed to adjudication. *Id.* A party has standing to bring a claim if it has suffered some actual or threatened injury.

"The controversy requirement of the Declaratory Judgment Act is synonymous with that of Article III of the Consti-

tution." *Carson v. Pierce*, 719 F.2d 931, 933 (8th Cir.1983) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40, 57 S.Ct. 461, 81 L.Ed. 617 (1937); *Cass County v. United States*, 570 F.2d 737, 739 (8th Cir.1978)). In order to demonstrate standing, a plaintiff must "demonstrate that he has suffered [an] injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *464*Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (internal citations omitted)).

"The essential distinction between a declaratory judgment action and an action seeking other relief is that in the former no actual wrong need have been committed or loss have occurred in order to sustain the action." *Horne v. Firemen's Ret. Sys. of St. Louis*, 69 F.3d 233, 236 (8th Cir.1995) (quoting *United States v. Fisher-Otis Co.*, 496 F.2d 1146, 1151 (10th Cir.1974)). The County and the Bank argue that they have standing because they have suffered threatened injury caused by the Band's alleged ownership of certain parts of the Mille Lacs Indian Reservation. We disagree.

We give a district court's decision to dismiss a declaratory-judgment action unique and substantial discretion. *See Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942); *Horne v. Firemen's Retirement System of St. Louis*, 69 F.3d 233, 236-37 (8th Cir.1995). Here, the district court correctly concluded that the appellants lacked standing.

The Bank alleged in its complaint that the Band's assertion of regulatory authority over property in which the Bank holds a security interest reduced the value of its collateral. Specifically, the Bank alleges that, if imposed, the Band's

enactments could impact federal banking laws and the Minnesota Uniform Commercial Code thereby directly affecting the Bank's operations. Also, the Bank noted that the Band owns a nearby financial institution that competes directly with the Bank. The Bank provided affidavits of lenders expressing concern whether clear title to their property can be obtained in the disputed area. The Bank also provided letters from residents stating that they would not have purchased property within the boundaries of a reservation and that they would not have built a home within the boundaries of a reservation. These statements of concern, however, do not establish an injury in fact. At best, they reflect speculative harms based upon the assumed future intent of the Band.

The County has failed to establish standing. We agree with the Band that the County has been unable to point to any definite controversy that exists from the Band's purported expansion of tribal jurisdiction over the disputed portion of the reservation. The County presented no evidence that its ability to enforce state or local law on the reservation has been usurped or even affected by the Band's alleged intentions. In order to demonstrate standing, a plaintiff must demonstrate that he has suffered an injury or a threatened injury. Neither the County nor the Bank has shown that it is in immediate danger of sustaining threatened injury traceable to an action of the Band. Therefore, they are unable to demonstrate standing. Furthermore, because there is no actual "case or controversy" before our Court, the ripeness issue is moot.

B. *Dismissal*

The district court issued its summary judgment with prejudice. A district court is generally barred from dismissing a case with prejudice if it concludes subject matter jurisdiction is absent. *Ahmed v. United States*, 147 F.3d 791,

797 (8th Cir.1998) (citing *Johnson v. Boyd-Richardson Co.*, 650 F.2d 147, 148 (8th Cir.1981) ("Under Rule 41(b) of the Federal Rules of Civil Procedure, dismissal for lack of jurisdiction is not an adjudication on the merits and thus such a dismissal should be without prejudice")); *Charchenko v. City of Stillwater*, 47 F.3d 981, 985 (8th Cir.1995). Because the district *465 court dismissed solely on jurisdictional grounds, dismissal with prejudice is premature. We reverse this portion of the judgment and direct that the district court enter judgment without prejudice.

III.

In conclusion, we affirm the district court's dismissal for lack of standing. However, we reverse the district court's decision to dismiss the complaint with prejudice. The appellant's motion to supplement the record is denied.

361 F.3d 460

Briefs and Other Related Documents (Back to top)

2003 WL 23096741 (Appellate Brief) Reply Brief of Plaintiff-Appellant County of Mille Lacs (Oct. 17, 2003)Original Image of this Document (PDF)

- 03-2537 Docket) (Jun. 17, 2003)
- 03-2527 Docket) (Jun. 16, 2003)
- 2003 WL 23096738 (Appellate Brief) Brief of Plaintiff-Appellant County of Mille Lacs (2003)Original Image of this Document (PDF)
- 2003 WL 23096739 (Appellate Brief) Brief of the State of South Dakota, Amicus Curiae, in Support of Petitioner (2003)Original Image of this Document (PDF)

- 2002 WL 32340890 (Appellate Brief) Brief of Appellant First National Bank of Milaca (2002)Original Image of this Document (PDF)

APPENDIX B

UNITED STATES DISTRICT COURT
D. MINNESOTA

No. 02-CV-407 JMRRLE

COUNTY OF MILLE LACS *et al.*

v.

MELANIE BENJAMIN *et al.*

May 6, 2003

ORDER

ROSENBAUM, *Chief Judge.*

Plaintiff County of Mille Lacs ("County"), and intervenor, First National Bank of Milaca,[1] ask the Court to declare the legal status of an Indian reservation.[2] The reservation was established by an 1855 treaty between the Mille Lacs Band of Chippewa Indians and the United States of America. Defendants are individual leaders of the Mille Lacs Band of Chippewa Indians. This matter is before the Court on defendants' motion for summary judgment.

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[1] The First National Bank of Milaca has intervened as a plaintiff. *See* Fed.R.Civ.P. 24(a)(2). For purposes of this motion, the Court will refer to the County and the Bank collectively as plaintiffs.

[2] Plaintiffs also ask the Court to strike defendants' supplemental exhibits and affidavits. Because these materials were not used by the Court in rendering its decision, plaintiffs' motion is moot.

I. *Background*

A brief history of the reservation provides a context for this dispute. In 1837, not far from Fort Snelling, Minnesota, the United States and 12 Chippewa Nation Bands negotiated a treaty under which the Chippewa Bands ceded title to certain upper midwest lands to the United States.

On February 22, 1855, the Minnesota Chippewa entered into another treaty, whereby six separate tracts of reservation land were established as a permanent home for the Minnesota Chippewa, including the Mille Lacs Band. The Mille Lacs Band encompassed some 61,000 acres around Kathio, South Harbor, and Isle Harbor townships in Minnesota (hereinafter "the 1855 reservation").

Two additional treaties, 12 Stat. 1249 (1863) and 13 Stat. 693 (1864),[3] are of interest. In 1863, and again in 1864, the Minnesota Chippewa entered into treaties ceding further lands to the United States. Article XII of both treaties provides, "that, owing to the heretofore good conduct of the Mille Lac [sic] Indians, they shall not be compelled to remove [from their reservation to White Earth] so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."

The treaty terms were not, however, always honored. As stated by the Court of Claims, "[t]he 1863 and 1864 treaties notwithstanding, between 1871 and 1889, 55,976.42 acres of the Mille Lac land were filed against under the public land laws, i.e., homestead and preemption entries were made on over ninety percent of it." *Minn. Chippewa Tribe v. United States*, 11 Cl.Ct. 221, 225 (1986). On July 4, 1884, to forestall this loss, Congress stayed any patenting or disposal of Mille Lacs land pending further legislation. *See* Ch. 180, 23 Stat.

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[3] The 1864 Treaty also earmarked specific tracts of land for Mille Lacs Band leadership.

76, 98 (1884). In 1889, not long thereafter, Congress passed the Nelson Act, which applied the policies of the General Allotment Act to the Chippewa Bands. The Nelson Act contained several provisions significantly different from the General Allotment Act. While the General Allotment Act provided individual members with certain proceeds from the sale of tribal land, the Nelson Act directed any profits derived from land sales into a collective permanent trust fund for the Minnesota Chippewa Band.

On February 15, 1909, Congress authorized the Court of Claims:

> to hear and determine a suit or suits to be brought by and on behalf of the Mille Lac [sic] Band of Chippewa Indians in the State of Minnesota against the United State [sic] on account of losses sustained by them or the Chippewas of Minnesota by reason of the opening of the Mille Lac [sic] Reservation . . . to public settlement under the general land laws of the United States.

35 Stat. 619, c. 126 (1909). The Mille Lacs Band filed suit pursuant to the 1909 Act to recover losses resulting from the 1889 Act. This suit was ultimately heard and resolved by the United States Supreme Court, which ordered an assessment of damages in favor of the Band. *See United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 33 S.Ct. 811, 57 L.Ed. 1299 (1913). Shortly after this decision, the United States purchased land for the Mille Lacs Band and made allotments to it and its members. The 4,000 acres purchased at that time are held in trust, and are not disputed here.

In 1990, the Mille Lacs Band filed a lawsuit which casts its shadow over the present matter. By joining with several other Bands, they sought a declaratory judgment to establish entitlement to continued implied hunting and fishing rights originally guaranteed in the 1837 Treaty. Nine years later, the United States Supreme Court ruled in their favor, and in

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999), found that the 1837 Treaty protected the their hunting and fishing rights. Notwithstanding the finality of the Supreme Court's decision, there still remain a number of unresolved issues between the Mille Lacs Band and neighboring landowners.

It is also appropriate to recognize that, over the past few years, the Mille Lacs Band has opened two highly successful casinos, and has used revenues therefrom to acquire additional land. During this time, the Mille Lacs Band leaders have referred to a possible reassertion of their claim to land within the 1855 reservation boundaries. This claim has exacerbated relations between the Mille Lacs Band and its nearby neighbors, who brought this case. Plaintiffs ask the Court to declare that the Mille Lacs Band has no claim to any land beyond that which it occupies today.

II. *Discussion*

Defendants premise their motion to dismiss on four jurisdictional arguments. First, they claim plaintiffs lack standing to assert their claims. Second, they deny plaintiffs' claims are ripe for adjudication. Third, they claim sovereign immunity bars the action. Fourth, they claim plaintiffs' failure to join the United States in this action is a failure to join an indispensable party.[4]

Before addressing the merits of their motion, the Court must consider the posture of the motion. The First National Bank of Milaca argues that dismissal, not summary judgment, is the proper remedy for a non-justiciable suit. Pl. Opp'n Mem. at 8 (citing Fed.R.Civ.P. 12(b)). While the Court agrees that if plaintiffs lack standing dismissal is the proper remedy, it finds defendants have properly raised justiciability argu-

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[4] The Court finds it lacks subject matter jurisdiction and declines to rule on the latter two arguments.

ments through their summary judgment motion. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329, 119 S.Ct. 765, 142 L.Ed.2d 797 (1999); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

Defendants are foreclosed from filing a motion to dismiss, having already interposed an answer. Fed.R.Civ.P. 12(b) ("A motion making any [12(b)] defenses shall be made before pleading if a further pleading is permitted."); *see* also 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 (Supp.2002) ("[M]otions raising [a lack of subject matter defense] may be considered by the court even when interposed after the responsive pleading has been filed, although technically [it is] no longer [a] Rule 12(b) motion [ ]."). Therefore, because a motion to dismiss is procedurally barred, the Court employs the traditional summary judgment analysis to evaluate standing.

Under this rubric, plaintiffs must establish a genuine issue of material fact as to justiciability in order to survive summary judgment. *Dep't of Commerce,* 525 U.S. at 329, 119 S.Ct. 765 ("To prevail on a . . . motion for summary judgment—as opposed to a motion to dismiss—[ ] mere allegations of injury are insufficient. Rather, a plaintiff must establish that there exists no genuine issue of material fact as to justiciability or the merits."); *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130 ("Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.") (citations omitted).

A. *Standing*

The question of standing "involves constitutional limitations of federal court jurisdiction." *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). "To satisfy the case or controversy requirement of Article III, which is the irreducible constitutional minimum of standing, a plaintiff must, generally speaking, demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Id.* "In addition to constitutional requirements, standing also involves prudential limits on the exercise of federal jurisdiction." *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036 (8th Cir.2002) (citing *Bennett,* 520 U.S. at 162, 117 S.Ct. 1154).

Constitutional standing "assures that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). "Absent specific facts establishing distinct and palpable injuries fairly traceable to [the defendants' conduct]" the injury in fact requirement is not satisfied. *Ark. ACORN Fair Hous., Inc. v. Greystone Dev., Inc.*, 160 F.3d 433, 435 (8th Cir.1998). Therefore, absent an actual controversy, the Court lacks jurisdiction. *See Caldwell v. Gurley Ref. Co.*, 755 F.2d 645, 648 (8th Cir.1985).

1. *Law of the Case*

First National Bank of Milaca claims the Court's inquiry into its standing is foreclosed by Magistrate Judge Noel's Order allowing it to intervene. The Bank asserts the

Magistrate's ruling established the binding "law of the case."[5] The Bank is incorrect; its position misconstrues the "law of the case."

The Bank cites a number of cases, including *Klein v. Arkoma Prod. Co.*, 73 F.3d 779, 784 (8th Cir.1996), to support its position. *Klein*, however, refers not to a magistrate's ruling vis-a-vis the district court hearing the case, but rather to the precedential effect of an appellate court's decision on the lower court when the matter is remanded. This case is entirely different.

If the Bank's argument is correct, this Court could never alter a magistrate's decision, or indeed, one of its own. To the contrary, it is clear that a district court may correct itself to avoid later reversal when convinced a decision "is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 n. 8 (1983); *Lovett v. Gen. Motors Corp.*, 975 F.2d 518, 522 (8th Cir.1992); 28 U.S.C. § 636 (granting district court judge's authority to reverse erroneous magistrate orders). In *Lovett*, the Eighth Circuit Court of Appeals upheld a district court's reconsideration of its own standing decision. *See id.* Because the law of the case doctrine applies only to issues decided by final judgments, *id.*, the earlier decision did not bind the court. Here, the Magistrate did permit the Bank to intervene. But the law of the case does not bar this Court's consideration of the Bank's standing.

2. *Do Plaintiffs Have Standing?*

Constitutional standing requires that plaintiffs suffer some injury to justify the Court's entry of a declaratory judgment. Standing requires either actual or threatened injury. *Babbitt*,

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[5] Article III standing is a prerequisite to intervention. *Standard Heating & Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 570 (8th Cir.1998).

442 U.S. 289, 292, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). "At the summary judgment stage the party invoking federal jurisdiction must have at least alleged specific facts that, taken as true, demonstrate the party suffered an injury in fact, that is one which is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Nat'l Fed'n for the Blind v. Cross*, 184 F.3d 973, 979 (8th Cir.1999) (citing *Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130).

Plaintiffs' primary claim arises out of threatened regulation by Mille Lacs Band ordinances.[6] The Court finds this claimed injury does not meet the constitutional requirement for standing; it is not actual, concrete, or imminent.

While actual enforcement of regulatory ordinances is not required by law, standing requires more than an "imaginary or speculative" fear of prosecution. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). An injury may involve past prosecution, *United Food & Commercial Workers Int'l Union v. IBP, Inc.,* 857 F.2d 422, 427 (8th Cir.1988), or the intent to engage in the exercise of a constitutionally guaranteed right, *Doe v. Bolton,* 410 U.S. 179, 188, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). *See also Stoianoff v. Montana,* 695 F.2d 1214 (9th Cir.1982) ("The mere existence of a statute, which may or may not ever be applied to plaintiffs, is not sufficient to create a controversy within the meaning of Article III."). In order to *996 allege a cognizable injury, plaintiffs must demonstrate a realistic danger of enforcement by the Band.

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[6] *See, e.g.* 18 M.L.B.S.A. § 101 (requiring Band licensure to conduct business with the Band or within its jurisdiction); 24 M.L.B.S.A. §§ 3301-3309, 3501-3510 (setting debtor/creditor law); 11 M.L.B.S.A. § 9 (providing environmental protection regulations); 11 M.L.B.S.A. § 1002 (regulating waste disposal); 5 M.L.B.S.A. §§ 111(a)-(e), 113 (establishing general tribal court jurisdiction); 24 M.L.B.S.A. § 2-6, 5 M.L.B.S.A. §§ 101, 111-13(asserting various areas of exclusive tribal court jurisdiction within the tribal lands).

In *Steffel v. Thompson*, the United States Supreme Court permitted a pre-enforcement First Amendment challenge to a law, but the law was a criminal statute. *See* 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). The Court limited potential prosecution claims to cases where the threat of prosecution is not imaginary, speculative, or chimerical. *Id.*; *United Food,* 857 F.2d at 425-30 (first amendment challenges to previously enforced criminal picketing statutes); *High Ol' Times, Inc. v. Busbee*, 621 F.2d 135, 138-39 (5th Cir.1980) (first amendment challenge to a criminal statute). These cases, in contrast to the present case, uniformly involve chilled speech, an area traditionally afforded a high degree of constitutional protection. Plaintiffs point to neither an imminent threat of criminal prosecution nor to a history of past prosecution. The ordinances about which they complain certainly present no threat to their right to free speech, or other fundamental rights.

Plaintiffs offer *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458 (8th Cir.1993), to support their claim to standing. Their reliance is misplaced. *Prairie Island* is distinguishable on its facts. In *Prairie Island,* the Mdewakanton Sioux expressed its present intention to enforce a tribal ordinance regulating the transport of nuclear waste on an established reservation which houses a functioning nuclear electrical generation plant. *Id.* at 459. On those facts, Northern States Power could easily demonstrate an actual ongoing injury stemming from the ordinance, including delays in the shipping of hazardous nuclear waste and the inability to monitor the safety of a nuclear energy plant. *See id.* at 463. *Prairie Island* is not analogous to this case.

The Mille Lacs Band has neither threatened nor demonstrated an intention to enforce its ordinances beyond its 4000 acres. *See Assoc. of Prop. Owners/Residents of Port Madison Area v. Individual Council Members of the*

Suquamish Tribal Council, C01-5317FBD, *4 (W.D. Wash. April 17, 2002) (finding no injury where tribe had not tried to enforce ordinance against plaintiff). The only shred of evidence supporting plaintiffs' claim of imminent enforcement is a March 23, 1992, letter from defendants concerning licensing. Defendants claim this letter was sent in error, and that licensing is required only of those with whom the Mille Lacs Band, itself, does business.[7] Given that the Mille Lacs Band sent this letter more than 10 years ago, has run its licensing program for the past 11 years, and has never directly contacted either plaintiff, the Court finds the proffered letter wholly fails to demonstrate an immediate or certain threat of enforcement or injury. Absent a credible threat of enforcement, plaintiffs' claims are mere conjecture and do not give rise to standing. *Brown-Outagamie-Oneida Jurisdiction Comm'n v. Powless*, 85-C-1052 (E.D.Wisc. Sept. 28, 1990) (finding case not ripe where tribe had not attempted to enforce ordinance).

The text of the Mille Lacs Band ordinances similarly fails to prove pending enforcement. The only reference to the 1855 reservation is in the definitions section of the hunting, fishing, and wild rice ordinances. *See* 11 M.L.B.S.A. § 2001(n). This reference facially relates to the landmark *Minnesota v. Mille Lacs Band of Chippewa Indians* case. Such a limited *997 reference is insufficient to indicate an intent to enforce all of the Mille Lacs Band ordinances on the land within the 1855 boundaries.[8]

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[7] A similar letter, sent in 2001, expressly includes only those doing business with the tribe, *see* Pl.Ex. 18. This letter appears consistent with defendants' sworn statements. *See* Twait Dec. at 2; Big Bear Aff. at 1-2.

[8] Similarly, 11 M.L.B.S.A. § 9(e), which provides jurisdiction to enforce environmental regulations, is limited to the extent of United States law. As federal law largely proscribes the broad assertion of tribal jurisdiction over non-Indians, *Nevada v. Hicks*, 533 U.S. at 388- 92, 121

The County complains it has been injured in its ability to protect public safety, citing concerns over civil regulatory and traffic laws, and zoning regulations. It insists, therefore, that it needs this Court's clarification of tribal land boundaries.

The Tenth Circuit Court of Appeals considered this issue in *Norvell v. Sangre de Cristo Dev. Co., Inc.*, 519 F.2d 370 (10th Cir.1975), in which the State of New Mexico sought a declaratory judgment establishing the scope of its jurisdiction over a company operating on reservation land. *Id.* at 371-72. New Mexico claimed its "direct concern[ ] with the applicability of its laws and regulations not only as to the Company, but derivatively to the community of approximately 15,000 non-Indian persons who will ultimately live and do business in the non-Indian community" was sufficient to create an actual case or controversy. *Id.* at 374. The appellate court did not agree, holding that absent evidence that Indians were refusing to comply with state law, no case or controversy existed. *Id.* at 376-77. The same principle holds here; the County's mere interest in the proper enforcement of law and community safety does not provide standing. *Id.*

The Mille Lacs Band and its members have consistently complied—however grudgingly—with the County's zoning regulations and state traffic laws. The deposition testimony of the Mille Lacs County Sheriff, Dennis Boser, indicates the Mille Lacs Band has taken no actions which adversely affect the County's ability to enforce state or county law, and that any legal conflicts which do exist have not harmed public safety. *See* Pl. Bank Ex. 7 at 14, 19, 47. Even assuming the Mille Lacs Band members obey the County's ordinances only "under protest," plaintiffs have not shown that their

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S.Ct. 2304, the Court will not construe this provision beyond both actual enforcement and its terms.

compliance "under protest" has created a real injury.[9] When examined, the County's position appears to be that the Court should hold that defendants' *compliance* with County law constitutes injury. The Court is unable to find any legal precept that can support this theory.

The County's concern over potential liability similarly affords no colorable claim. The County claims its potential liability stemming from law enforcement beyond its jurisdiction constitutes a cognizable injury. It supports this position by citing *Ross v. Neff*, 905 F.2d 1349 (10th Cir.1990), in which a state police officer arrested an Indian in Indian Country in a non-Public Law 280 state. This arrest led to a civil rights case involving potential municipal liability. The Court finds *Ross* insufficient to support this claim.

It is clear that potential liability stemming from a filed complaint can be sufficient to create standing. *See Va. Sur. Co. v. Northrop Grumman Co.*, 144 F.3d 1243, 1246 (9th Cir.1998). On the other hand, an *998 amorphous threat of future liability alone does not result in injury. If such an inchoate claim could support standing, a court could intervene whenever any entity faced the possibility of future litigation. *See O'Shea v. Littleton*, 414 U.S. 488, 497, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (finding plaintiffs lacked standing to complain of an injury that would occur "*if* they proceed[ed] to violate an unchallenged law and *if* they [were] charged, held to answer and tried in any proceedings"); *Caribbean Marine Serv. Co., Inc. v. Baldrige*, 844 F.2d 668, 675 (9th Cir.1988) (finding no standing where plaintiffs claim

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[9] The cases cited by the County cannot be read to stand for this proposition. *See, e.g., Altvater v. Freeman*, 319 U.S. 359, 63 S.Ct. 1115, 87 L.Ed. 1450 (1943) (continued dispute over reissued patents gave rise to controversy); *Atchison, Topeka & Sante Fe Railway Co. v. O'Connor*, 223 U.S. 280, 285-87, 32 S.Ct. 216, 56 L.Ed. 436 (1912) (action to recover taxes paid under protest). Neither case is premised on a defendant's actual compliance with a law.

increased exposure to liability dependent on multiple contingencies); *City of South Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 238-39 (9th Cir.1980) (finding no standing where exposure to civil liability is speculative).

Here, the County's exposure to liability depends on the likelihood of its officers' violating the constitutional rights of Mille Lacs Band members by reason of municipal policy or custom. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Court has no evidence before it which suggests such an illegal policy is in place in Mille Lacs County. This scenario is scarcely the kind of risk upon which jurisdiction can be based. The Court must, absent evidence to the contrary, assume the County's law enforcement officers will continue to protect the citizenry and avoid constitutional wrongs. The Court finds the County's proffered "threat of civil liability is too attenuated and conjectural to constitute a basis for standing." *Caribbean Marine*, 844 F.2d at 675.

Next, plaintiffs claim statements made by defendants regarding their rights under the 1855 Treaty have caused a loss or degradation of local real estate values. The Bank claims $11,000,000 in real estate loans have been jeopardized; the County claims a loss of property tax revenue and a potential diminution of resale value should it sell municipally-owned land. Plaintiffs offer these claims, underpinned by the affidavit of real estate appraiser Roger Wagner. The Court rejects this insubstantial evidence.

Mr. Wagner's affidavit lacks the foundation necessary to fulfill Rule 56(e)'s requirement that statements in reply to a motion for summary judgment "set forth such facts as would be admissible into evidence." The only "fact" underlying his opinion is a published advertisement identifying a piece of property as "outside the disputed boundaries." He offers neither statistical nor empirical evidence comparing land

values within or without the 1855 reservation boundaries. He does not point to a single instance where the Bank has ever declined a mortgage or tendered one at a higher rate for property within or without those borders. The affidavit does not state that property values are lower in Mille Lacs County compared to its surrounding neighbors either as a result of or in connection to any perceived risk. Plaintiffs' "expert" offers nothing other than conjecture to show that verbal sparing over the 1855 boundaries has caused any devaluation or decline in real estate values. Mr. Wagner presents no data or quantification as to the actual lost value caused by the dispute, but merely offers his personal belief that some effect has occurred.

The Court notes the 1855 reservation borders include much of Mille Lacs Lake and other highly desirable vacation, business, and residential property. Taking into account the historically strong interest in owning this lakefront property, and the absence of evidence of so much as a single sale where proximity to Indian Country affected price, the Court finds plaintiffs allege no injury or risk of future injury.

Setting aside the utter paucity of admissible evidence supporting this claim, there is another problem with this proffered jurisdictional theory. Even assuming plaintiffs have correctly described landowners' fears, any claimed diminution of land value would result from the disinterest of third-party potential-purchasers in owning land in the reservation—not from legal uncertainty. The impact of this Court's decision depends, therefore, on actions of third-party property buyers and owners who are not parties to this litigation. *See Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130 ("there must be a causal connection between the injury and the conduct complained of—the injury has to be ' fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court' "). Independent personal

decisions on land value remain outside the control of the Court. Because this Court cannot affect buyers perceptions about the nature of title within a reservation—however unfounded—a decision on the merits will not redress these concerns.

Plaintiffs' devaluation argument also reflects confusion as to the nature of declaratory relief. Plaintiffs ask the Court to determine whether the 1855 reservation continues as a valid legal entity. The Court may decide the case as plaintiffs wish and find the reservation disestablished or diminished. But the Court could also make the contrary ruling and find the 1855 reservation a legally valid entity. If the Court were to do so—and notably the defendants have *not* sought this finding—the result could well solidify rather than ameliorate plaintiffs' fears. Plaintiffs' complaints stem then, not from uncertainty, but from fears and perceptions concerning an unfavorable decision on the lawsuit they have themselves initiated. This is not the kind of injury the law recognizes as conferring standing.

Before the Court will invoke its sweeping declaratory judgment power, it must preside over a live controversy. Here, plaintiffs have not offered proof that such a controversy of constitutional dimension exists. The Court, therefore, cannot address the serious issues before it.

B. *Ripeness*

As an alternative, but certainly related basis, the Court finds this case is not ripe for adjudication. *See U.S. Const. Art. III; see also United Food*, 857 F.2d at 425-26 (applying ripeness to Declaratory Judgment Act). The ripeness doctrine precludes any decision on a legal or factual question absent "a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical and abstract." *See Babbitt*, 442 U.S. at 298, 99 S.Ct. 2301 (quotations omitted). Ripeness requires "fitness of the

issues for judicial decision" and examination of "the hardship to the parties of withholding court consideration." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

The Declaratory Judgment Act calls upon the Court to apply a heightened standard of ripeness, allowing judicial intervention only where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *See Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 506, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972); *Gopher Oil Co. v. Bunker*, 84 F.3d 1047, 1050 (8th Cir.1996) (citing *Caldwell*, 755 F.2d at 649). The Court's declaratory power is strictly discretionary, *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 282, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995), and is to be exercised with caution.

The Court finds this litigation involves only hypothetical and speculative *1000 disagreements. *See Cass County v. United States*, 570 F.2d 737, 738 (8th Cir.1978) (finding generalized claims of confusion over jurisdiction lack needed specificity). According to plaintiffs, legal uncertainty over tribal jurisdiction within the 1855 reservation boundaries has created an unbearable hardship requiring judicial action.[10] While the Courts have found uncertainty regarding legal

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[10] Plaintiffs support this contention by pointing to Justice Souter's concurrence in *Nevada v. Hicks*, 533 U.S. 353, 383, 121 S.Ct. 2304, 150 L.Ed.2d 398 (1995). That case involved a tribal court's assertion of jurisdiction over state actors in a § 1983 case. The language plaintiffs quote, however, comes from a portion of Justice Souter's opinion which urges ending any linkage of tribal jurisdiction from status. He argues that maintaining this connection creates an "unstable jurisdictional crazy quilt." *Id.* At best, the quoted language can be read as a call for bright-line rules governing subject matter jurisdiction for tribal courts. The Court cannot find in the Justice's quoted language any support for a requirement to resolve every possible dispute over land ownership or reservation status.

status can justify judicial action in a limited number of cases, *see, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985), those cases involved a clear injury in the absence of judicial action. *See id.* (wherein regulation restricted access to jury trial). Here, any overlapping jurisdictional claims are highly conjectural, and a decision on these abstracted claims is unwarranted. *See Cass County*, 570 F.2d at 741-42 (connecting boundary decisions to disputes over taxing authority, criminal jurisdiction, and fishing and hunting rights cases).

Plaintiffs cite a number of cases where courts have resolved land disputes through declaratory judgment, but none of them are analogous to this case. In each of the cited cases, there were concrete and specific incidents involving reservation boundaries and sovereignty. *See id.*; *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir.1986) (conversion and declaratory action arising from non-Indian harvesting on a reservation lake).

Plaintiffs ask the Court to focus on the *Rosebud Sioux Tribe* litigation. *See Rosebud Sioux Tribe v. Kneip*, 375 F.Supp. 1065 (D.S.D.1974), *aff'd* 521 F.2d 87 (8th Cir.1975), *aff'd* 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). That suit sought a declaration of the original reservation boundaries intact after the defendant county exercised both civil and criminal jurisdiction over tribe members. 430 U.S. at 585, 97 S.Ct. 1361, 51 L.Ed.2d 660. In *City of New Town v. United States*, 454 F.2d 121 (8th Cir.1972), plaintiff, a North Dakota municipality, sought declaratory relief in the wake of particularized challenges to municipal authority. Even if plaintiffs have tracked the pleadings filed in those cases, their having done so does not make this dispute ripe. The distinction is pristine: *Rosebud Sioux* and *City of New Town* presented ripe factual disputes; this one does not. The cited cases involved explicit efforts by one sovereign

to exercise particular powers beyond their lawful jurisdiction; they did not present abstracted concerns over reservation boundaries.

Plaintiffs offer a laundry list of problems and fears they feel are related to the possible existence of the 1855 reservation boundaries, and suggest these make this case ripe for adjudication. Their list includes greater regulatory authority under the EPA and National Historic Preservation Act, limits on county and state regulatory authority, and an expansion of the reach of tribal authority and sovereignty should the 1855 boundaries be in place. This litany of concerns misapprehends ripeness. If the Band's tribal authority covers the full extent of the 1855 reservation, *1001 it might well alter private and public sector relationships in the Mille Lacs area. The mere fact that a decision will be momentous does not, however, make this the proper time to render it.

Similarly, the ordinances examined above do not provide evidence of hardship. Simply put, in the absence of any immediate or impending concrete injury—where plaintiffs lack standing—any hardship caused by delayed review is conjectural. Plaintiffs claim the mere possibility that the Mille Lacs Band might try to enforce its ordinances is a valid ongoing threat, even if the ordinances have never been enforced. As explained, the law permits declaratory relief in a limited number of circumstances where enforcement is pending. Those circumstances are not present here; the parties are not faced with a choice between protected conduct and a risk of sanction. *See Caldwell*, 755 F.2d at 650 (stating the "threat of enforcement must have immediate coercive consequences" in order to intervene before regulatory action).

Ripeness is a question of timing. This Court will not exercise its declaratory judgment authority to interpret treaties and decide grave questions regarding reservation disestablishment in the absence of a real dispute. Plaintiffs

have failed to demonstrate why this Court should exercise its authority at this time. Accordingly, the Court lacks jurisdiction over this dispute.

III. *Conclusion*

It is axiomatic that federal court jurisdiction is limited. A justiciable case or controversy is central to the constitutional constraints on a federal court's ability to act. The Court has found plaintiffs lack standing to bring their claims and, alternatively, their claims are not yet ripe for adjudication. Accordingly, IT IS ORDERED that:

1. Defendants' motion [Docket No. 31] is granted.

2. Plaintiffs' motion to strike [Docket No. 54] is dismissed as moot.

3. This case is dismissed with prejudice.

262 F.Supp.2d 990

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2527/2537

COUNTY OF MILLE LACS,
Appellant,

v.

MELANIE BENJAMIN, ETC., *et al.*,
Appellees.

Order Denying Petition for Rehearing and
for Rehearing En Banc

The petitions for rehearing en banc are denied. The petition for rehearing by the panel are also denied.

(5128-010199)

May 19, 2004

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
MICHAEL E. GANS
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

INDIAN AFFAIRS

LAWS AND TREATIES

Vol. II
(TREATIES)

COMPILED AND EDITED

BY

CHARLES J. KAPPLER, LL. M.,
CLERK TO THE SENATE COMMITTEE
ON INDIAN AFFAIRS

WASHINGTON:
GOVERNMENT PRINTING OFFICE
1904

TREATY WITH THE CHIPPEWA OF THE MSSISSIPPI AND THE PILLAGER AND LAKE WINNIBIGOSHISH BAND, 1863.

Articles of agreement and convention, made and concluded at the city of Washington, this eleventh day of March, A. D. one thousand eight hundred and sixty-three, between William P. Dole, Commissioner of Indian Affairs, and Clark W. Thompson, superintendent of Indian affairs of the northern superintendency, on the part of the United States, and Henry M. Rice, of Minnesota, for and on behalf of the Chippewas of the Mississippi and the Pillager and Lake Winnibigoshish bands of Chippewa Indians in Minnesota.

Mar. 11, 1863.
12 Stats., 1249.
Ratified,
Mar. 13, 1863.
Proclaimed
Mar. 19, 1863.

Certain reservations ceded to the United States, except, etc.

ARTICLE 1. The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the 22d February, 1855, are hereby ceded to the United States, excepting one-half section of land, including the mission-buildings at Gull Lake, which is hereby granted in fee simple to the Reverend John Johnson, missionary.

Reservation set apart in lieu thereof.

ARTICLE 2. In consideration of the foregoing cession, the United States agree to set apart for the future homes of the Chippewas of the Mississippi, all the lands embraced within the following-described boundaries, excepting the reservations made and described in the third clause of the second article of the said treaty of February 22, 1855, for the Pillager and Lake Winnibigoshish bands; that is to say, beginning at a point one mile south of the most southerly point of Leech Lake, and running thence in an easterly course to a point one mile south of the most southerly point of Goose Lake; thence due east to a point due south from the intersection of the Pokagomin reservation and the Mississippi River; thence on the dividing-line between "Deer River and Lakes" and "Mashkorden's River and Lakes," until a point is reached north of the first-named river and lakes; thence in a direct

Boundaries.

line north westwardly to the outlet of "Two-Routes Lake;" thence in a southwesterly direction to the northwest corner of the "Cass Lake" reservation; thence in a southwesterly direction to "Karbekaun" River; thence down said river to the lake of the same name; thence due south to a point due west from the beginning; thence to the place of beginning.

Annuities.

ARTICLE 3. In consideration of the foregoing cession to the United States, and the valuable improvements thereon, the United States further agree: 1st. To extend the present annuities of the Indians, parties to this treaty, for ten years beyond the periods respectively named in existing treaties; 2nd. And to pay toward the settlement of the claims for depredations committed by said Indians in 1862, the sum of twenty thousand dollars, or so much thereof as may be necessary, provided that no money shall be paid under this item, except upon claims which have been duly adjudicated and found to be due under existing treaties, from said Indians, and allowed by the Secretary of the Interior, or under his direction; 4th. To the chiefs of the Chippewas of the Mississippi, sixteen thousand dollars, (provided they shall pay to the chiefs of the Pillager and Lake Winnibigoshish bands one thousand doliars,) to be paid upon the signing of this treaty, out of the arrearages due under the 9th article of the treaty concluded at La Pointe, in the State of Wisconsin, on the 30th of September, 1854; 5th. And to pay the expenses incurred by the legislature of the State of Minnesota in the month of September, 1862, in sending commissioners to visit the Chippewa Indians, amounting to thirteen hundred and thirty-eight dollars and seventy-five cents.

Reservation to be cleared, etc., in lots.

ARTICLE 4. The United States further agree to clear, stump, grub, and break in, the reservation hereby set apart for the Chippewas of the Mississippi, in lots of not less than ten acres each, at such point or points as the chiefs of each band may select, as follows, viz: For the Gull Lake band,

seventy acres; for the Mille Lac band, seventy acres; for the Sandy Lake band, fifty acres; for the Pokagomin band, fifty acres; for the Rabbit Lake band, forty acres; for the Rice Lake band, twenty acres; and to build for the chiefs of said bands one house each, of the following description: to be constructed of hewn logs; to be sixteen by twenty feet each, and two stories high; to be roofed with good shaved pine shingles; the floors to be of seasoned pine-plank, jointed; stone or brick fire-places and chimneys; three windows in lower story and two in the upper story, with good substantial shutters to each, and suitable doors; said houses to be pointed with lime mortar: provided, that the amount expended under this article shall not exceed the sum of three thousand six hundred dollars.

Houses for chiefs.

ARTICLE 5. The United States agree to furnish to said Indians, parties to this treaty, ten yoke of good, steady, work oxen, and twenty log-chains, annually, for ten years, provided the Indians shall take proper care of, and make proper use of the same; also, for the same period, annually, two hundred grubbing-hoes, ten ploughs, ten grindstones, one hundred axes, handled, not to exceed in weight three and one-half pounds each; twenty spades. Also two carpenters and two blacksmiths, and four farm laborers, and one physician—not exceeding, in the aggregate, one thousand dollars.

Oxen and tools.

Carpenters, blacksmiths, etc.

ARTICLE 6. The United States further agree to remove the saw-mill from Gull Lake reservation, to such point on the new reservation hereby set apart as may be selected by the agent, and to keep the same in good running order, and to employ a competent sawyer, so long as the President of the United States may deem it necessary; and to extend the road between Gull Lake and Leech Lake, from the last-named lake to the junction of the Mississippi and Leech Lake Rivers; and to remove the agency to said junction, or as near thereto as practicable; but not more than three thousand dollars shall be expended for this purpose.

Sawmill.

Board of visitors to be present at annuity payments.

ARTICLE 7. The President shall appoint a board of visitors, to consist of not less than two nor more than three persons, to be selected from such Christian denominations as he may designate, whose duty it shall be to attend the annuity payments to the Indians, and to inspect the fields and other improvements of the Indians, and to report annually thereon, on or before the first of November; and also as to the qualifications and moral deportment of all persons residing upon the reservation under the authority of law; and they shall receive for their services five dollars per day for the time actually employed, and ten cents per mile for travelling expenses: *Provided*, That no one shall be paid in any one year for more than twenty days' service, or for more than three hundred miles' travel.

Who to be recognized as chiefs.

ARTICLE 8. No person shall be recognized as a chief whose band numbers less than fifty persons; and to encourage and aid the said chiefs in preserving order, and inducing by their example and advice the members of their respective bands to adopt the pursuits of civilized life, there shall be paid to each of said chiefs, annually, out of the annuities of said bands, a sum not exceeding one hundred and fifty dollars, to be determined by the Commissioner of Indian Affairs, according to their respective merits.

Agents, teachers, etc., to have families, and to be of good moral charater.

ARTICLE 9. To improve the morals and Industrial habits of said Indians, it is agreed that no agent, teacher, interpreter, traders, or their employes, shall be employed, appointed, licensed, or permitted to reside within the reservations belonging to the Indians, parties to this treaty, missionaries excepted, who shall not have a lawful wife residing with them at their respective places of employment or trade within the agency, and no person of full or mixed blood, educated or partially educated, whose fitness, morally or otherwise, is not conducive to the welfare of said Indians, shall receive any benefits from this or any former treaties.

ARTICLE 10. All annuities under this or former treaties shall be paid as the chiefs in council may request, with the approval of the Secretary of the Interior, until otherwise altered or amended: *Provided*, That not less than one-half of said annuities shall be paid in necessary clothing, provisions, and other necessary and useful articles. Payment of annuities.

ARTICLE 11. Whenever the services of laborers are required upon the reservation, preference shall be given to full or mixed bloods, if they shall be found competent to perform them. Laborers to be full or mixed bloods, where competent.

ARTICLE 12. It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations until the United States shall have first complied with the stipulations of Articles 4 and 6 of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes, and subsistence for six months thereafter: *Provided*, That owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites. Indians not to remove from present reservations, until, after, etc. Mille Lac Indians.

ARTICLE 13. Female members of the family of any Government employé residing on the reservation, who shall teach Indian girls domestic economy, shall be allowed and paid a sum not exceeding ten dollars per month while so engaged: *Provided*, That not more than one thousand dollars shall be so expended during any one year, and that the President of the United States may suspend or annul this article whenever he may deem it expedient to do so. Female teachers.

ARTICLE 14. It is distinctly understood and agreed that the clearing and breaking of land for the Chippewas of the Mississippi, as provided for in the fourth article of this treaty, shall be in lieu of all former engagements of the United States as to the breaking of lands for those bands. Clearing and breaking, in lieu of former engagement.

In testimony whereof, the said William P. Dole and Clark W. Thompson, on behalf of the United States, and Henry M. Rice and the undersigned chiefs and headmen, on behalf of the Indians, parties to this treaty, have hereunto set their hands and affixed their seals this eleventh day of March, A. D. one thousand eight hundred and sixty-three.

Signature.

Wm. P. Dole, Commissioner of Indian Affairs. [SEAL.]

Clark W. Thompson, superintendent of Indian affairs for the northern superintendency. [SEAL.]

Henry M. Rice. [SEAL.]

Qui-we-shen-shish, or Bad Boy, his x mark. [SEAL.]

Wa-bo-geeg, or White Fisher, his x mark. [SEAL.]

J. Johnson, Rabbitt Lake band: [SEAL.]

Me-jaw-ke-ke-shick, or Sky that Touches the Ground, his x mark. [SEAL.]

Ah-ah-jaw-wa-ke-shick, Crossing Sky, his x mark. [SEAL.]

Naw-gaw-ne-gaw-bow, or One Standing Ahead, his x mark. [SEAL.]

Sandy Lake and Rice Lake bands: [SEAL.]

Aw-aw-bedway-we-dung, or Returning Echo, his x mark. [SEAL.]

Po-ke-ga-ma band: [SEAL.]

Ma-ya-je-way-we-dung, or Chorrister, his x mark. [SEAL.]

Shob-osh-kunk, or Passes under Everything, his x mark. [SEAL.]

Me-no-min-e-ke-shen, or Rice-maker, his x mark. [SEAL.]

Pe-dud-ence, Rat's Liver, his x mark. [SEAL.]

Te-daw-kaw-mo-say, Walking to and fro, his x mark. [SEAL.]

Mose-o-man-nay, or Moose, his x mark. [SEAL.]

Way-sa-wa-gwon-aib, Yellow Feather, his x mark. [SEAL.]

Me-no-ke-shick, or Fine Day, his x mark. [SEAL.]

Pillager band of Leech Lake:

Be-she-kee, or Buffalo, his x mark. [SEAL.]

Naw-bon-e-aush, Young Man's Son, his x mark. [SEAL.]

O-ge-ma-way-che-waib, Chief of the Mountain, his x mark. [SEAL.]

Ke-me-wen-aush, Raining Wind, his x mark. [SEAL.]

Keh-beh-naw-gay, the Winner, his x mark. [SEAL]

Kob-mub-bey, or North Star, his x mark. [SEAL.]

Mis-co-pe-nen-shey, Red Bird, his x mark. [SEAL.]

Maw-je-ke-shick, Travelling Sky, his x mark. [SEAL.]

Ma-ne-to-ke-shick, Spirit of the Day, his x mark. [SEAL]

O-Gee-tub, the Trader, his x mark. [SEAL.]

Executed in presence of—

E. A. C. Hatch,
Geo. C. Whiting,
A. S. H. White,
George Fuller,
James White head,
D. Geo. Morrison,
Paul H. Beaubien,
United States interpreter,
Peter Roy, interpreter,
J. G. Morrison, interpreter,
James Thompson.

APPENDIX E

INDIAN AFFAIRS

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1904

TREATY WITH THE CHIPPEWA OF THE MSSISSIPPI AND THE PILLAGER AND LAKE WINNIBIGOSHISH BAND, 1864.

Articles of agreement and convention made and concluded at the city of Washington this seventh day of May, A. D. 1864, between William P. Dole, Commissioner of Indian Affairs, and Clark W. Thompson, superintendent of Indian affairs for the northern superintendency, on the part of the United States, and the Chippewa chief Hole-in-the-day, and Mis-qua-dace, for and on behalf of the Chippewas of the Mississippi, and Pillager and Lake Winnebagoshish bands of Chippewa Indians in Minnesota.

May 7, 1864.
13 Stat. 693.
Ratified
Feb. 9, 1865.
Proclaimed
Mar. 20, 1865.

ARTICLE 1. The reservations known as Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake, as described in the second clause of the second article of the treaty with the Chippewas of the twenty-second of February, 1855, are hereby ceded to the United States, excepting one half section of land, including the mission buildings at Gull Lake, which is hereby granted in fee simple to the Reverend John Johnson, missionary, and one section of land, to be located by the Secretary of the Interior on the southeast side of Gull Lake, and which is hereby granted in fee simple to the chief Hole-in-the-day, and a section to chief Mis-qua-dace, at Sandy Lake, in like manner, and one section to chief Shaw-vosh-kung, at Mille Lac, in like manner.

Gull Lake and other reservations ceded to the United States, except, etc.

Hole-in-the-day-Mis-qua-dace, Shaw, voch-kung.

ARTICLE 2. In consideration of the foregoing cession, the United States agree to set apart, for the future home of the Chippewas of the Mississippi, all the lands embraced within the following-described boundaries, excepting the reservations made and described in the third clause of the second article of the said treaty of February 22d, 1855, for the Pillager and Lake Winnebagoshish bands; that is to say, beginning at a point one mile south of the most southerly point of Leach Lake, and running thence in an easterly course to a point one mile south of the most southerly point of Goose Lake, thence due east to a point due south from the intersection of the Pokagomin reservation and the Mississippi River, thence on the dividing-line between Deer River and lakes and Mashkordens River and lakes, until a point

Reservation for the Chippewa of the Mississippi.

Boundaries.

is reached north of the first-named river and lakes; thence in a direct line northwesterly to the outlet of Two Routs Lake, then in a southwesterly direction to Turtle Lake, thence southwesterly to the head-water of Rice River, thence northwesterly along the line of the Red Lake reservation to the mouth of Thief River, thence down the centre of the main channel of Red Lake River to a point opposite the mouth of Black River, thence southeasterly in a direct line with the outlet of Rice Lake to a point due west from the place of beginning, thence to the place of beginning.

Annuities to be extended for ten years.

ARTICLE 3. In consideration of the foregoing cession to the United States, and the valuable improvements thereon, the United States further agree, first, to extend the present annuities of the Indians, parties to this treaty, for ten years beyond the periods respectively named in existing treaties; second, and to pay towards the settlement of the claims for depredations committed by said Indians in 1862, the sum of twenty thousand dollars; third, to the chiefs of the Chippewas of the Mississippi, ten thousand dollars, to be paid upon the ratification of this treaty; and five thousand dollars to the chief Hole-in-the-day, for depredations committed in burning his house and furniture in 1862.

Payment toward settlement for depredations, and to the chiefs.

Payments for clearing, etc., lots in reservation. See. Art. 14.

ARTICLE 4. The United States further agree to pay seven thousand five hundred ($7,500) dollars for clearing, stumping, grubbing, breaking, and planting, on the reservation hereby set apart for the Chippewas of the Mississippi, in lots of not less than ten acres each, at such point or points as the Secretary of the Interior may select, as follows, viz: For the Gull Lake band, seventy (70) acres; for the Mille Lac band, seventy (70) acres; for the Sandy Lake band, fifty (50) acres; for the Pokagomin band, fifty (50) acres; for the Rabbit Lake band, forty (40) acres; for the Rice Lake band, twenty (20) acres; and to expend five thousand dollars ($5,000) in building for the chiefs of said bands one house each, under the direction of the Secretary of the Interior.

Houses for chiefs.

Oxen, plows, and agricultural implements to be furnished.

ARTICLE 5. The United States agree to furnish to said Indians, parties to this treaty, ten (10) yoke of good steady work oxen, and twenty log-chains annually for ten years, provided the Indians shall take

proper care of and make proper use of the same; also for the same period annually two hundred (200) grubbing-hoes, ten (10) ploughs, ten (10) grindstones, one hundred (100) axes, handled, not to exceed in weight three and one-half pounds each, twenty (20) spades, and other farming implements, provided it shall not amount to more than fifteen hundred dollars in one year; also two carpenters, and two blacksmiths, and four farm-laborers, and one physician.

Carpenters, blacksmiths, laborers, and physician.

ARTICLE 6. The United States further agree to pay annually one thousand dollars ($1,000) towards the support of a sawmill to be built for the common use of the Chippewas of the Mississippi and the Red Lake and Pembina bands of Chippewa Indians, so long as the President of the United States may deem it necessary; and to expend in building a road, bridges, &c., to their new agency seven thousand five hundred dollars ($7,500;) and to expend for new agency buildings, to be located by the Secretary of the Interior for the common use of the Chippewas of the Mississippi, Red Lake, and Pembina, and Pillager and Lake Winnebagoshish bands of Chippewa Indians, twenty-five thousand dollars ($25,000.)

Sawmill.

Road, bridges, etc.

Buildings.

ARTICLE 7 There shall be a board of visitors, to consist of not less than two nor more than five persons, to be selected from such Christian denomination or denominations as the chiefs in council may designate, whose duty it shall be to be present at all annuity payments to the Indians, whether of goods, moneys, provisions, or other articles, and to inspect the fields, buildings, mills, and other improvements made or to be made, and to report annually thereon, on or before the first day of November; and also as to the qualifications and moral deportment of all persons residing upon the reservation under the sanction of law or regulation, and they shall receive for their services five dollars per day for the time actually employed, and ten cents per mile for travelling expenses; *Provided*, That no one shall be paid in any one year for more than twenty days' service, or for more than three hundred miles' travel.

Board of visitors to be present at annuity payment, make inspection, and report annually.

Pay.

ARTICLE 8. No person shall be recognized as a chief whose band numbers less than fifty persons; and to encourage and aid the said chiefs in preserving order, and inducing by their example and advice, the members of their respective bands to adopt the pursuits of civilized life, there shall be paid to each of said chiefs annually out of the annuities of said bands, a sum not exceeding one hundred and fifty dollars, ($150,) to be determined by their agent according to their respective merits.

Chiefs with bands of less than fifty not to be recognized.

Gratuities.

ARTICLE 9. To improve the morals and industrial habits of said Indians, it is agreed that no agent, teacher, interpreter, trader, or other employees shall be employed, appointed, licensed, or permitted to reside within the reservations belonging to the Indians, parties to this treaty, missionaries excepted, who shall not have a family residing with them at their respective places of employment or trade within the agency, whose moral habits and fitness shall be reported upon annually by the board of visitors; and no person of full or mixed blood, educated or partially educated, whose fitness, morally or otherwise, is not conducive to the welfare of said Indians, shall receive any benefit from this or any former treaties, and may be expelled from the reservation.

Agent, teachers, etc., to have families.

Improper persons not be have benefits of treaties.

ARTICLE 10. All annuities under this or former treaties shall be paid as the chiefs in council may request, with the approval of the Secretary of the Interior, until otherwise altered or amended, which shall be done whenever the board of visitors, by the requests of the chiefs, may recommend it: *Provided* That no change shall take place oftener than once in two years.

Payment of annuities.

ARTICLE 11. Whenever the services of laborers are required upon the reservation, preference shall be given to full or mixed bloods, if they shall be found competent to perform them.

Preference given to full or mixed bloods as laborers.

ARTICLE 12. It shall not be obligatory upon the Indians, parties to this treaty, to remove from their present reservations until the United States shall have first complied with the stipulations of Articles IV and VI of this treaty, when the United States shall furnish them with all necessary transportation and subsistence to their new homes and subsistence for six

Indians not to remove from present reservations until, etc.

months thereafter: *Provided*, That, owing to the heretofore good conduct of the Mille Lac Indians, they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites: *Provided*, That those of the tribe residing on the Sandy Lake reservation shall not be removed until the President shall so direct.

Certain females may be paid as teachers.

ARTICLE 13. Female members of the family of any government employe[e] residing on the reservation, who shall teach Indian girls domestic economy, shall be allowed and paid a sum not exceeding ten dollars per month while so engaged: *Provided*, That not more than one thousand dollars shall be so expended during any one year, and that the President of the United States may suspend or annul this article whenever he may deem it expedient to do so.

Proviso.

Provisions for clearing, etc., lands to be in lieu of former provisions.

ARTICLE 14. It is distinctly understood and agreed that the clearing and breaking of land for the Chippewas of the Mississippi, as provided for in the fourth article of this treaty, shall be in lieu of all former engagements of the United States as to the breaking of lands for those bands, and that this treaty is in lieu of the treaty made by the same tribes, approved March 11th, 1863.

In testimony whereof the said Wm. P. Dole and Clark W. Thompson, on behalf of the United States, and Chippewa chiefs, Hole-in-the-day and Mis-qua-dace, on behalf of Indians parties to this treaty, have hereunto set their hands and affixed their seals this seventh day of May, A. D. one thousand eight hundred and sixty-four.

W. P. Dole, Commissioner Indian Affairs. [SEAL.]
Clark W. Thompson, Superintendent Indian Affairs. [SEAL.]
Que-ze-zance, or Hole-in-the-day, his x mark. [SEAL.]
Mis-qua-dace, or Turtle, his x mark. [SEAL.]

Signed in presence of-

Peter Roy, special interpreter.
Benjn. Thompson.

APPENDIX F

5 MLBSA § 111. Subject matter jurisdiction

(a) The Court of Central Jurisdiction shall have jurisdiction over all civil and criminal matters as prescribed by law.

(b) The Court of Central Jurisdiction is hereby granted exclusive original jurisdiction over all criminal or civil causes of action, involving any person, where such grievance or dispute arises concerning any property personal or otherwise, located on lands or contiguous waters subject to the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians.

(c) The Court of Central Jurisdiction shall have subject matter jurisdiction over any cause of action that may arise from unwritten cultural law or a violation thereof. The Court of Central Jurisdiction however, in the exercise of its authority to enforce all provisions of unwritten cultural law and upon the authority it possess as to accord equal justice shall give full force and effect to 24 MLBSA Chapter 1, if the provisions of that chapter are not inconsistent with any custom or cultural law heretofore or hereafter in place in the determination of cultural causes of action arising pursuant to any statute of the Non-Removable Mille Lacs Band of Chippewa Indians.

(d)(l) The Court of Central Jurisdiction shall have jurisdiction over all civil matters in which the Non-Removable Mille Lacs Band of Chippewa Indians, any of its political subdivisions or entities, or its officers, appointees or employees are parties in their official capacity. Nothing herein shall be construed as a waiver of sovereign immunity of the Band unless specifically authorized in accordance with Band law or by specific Band Statute.

(2) The Court of Central Jurisdiction has exclusive jurisdiction over all suits in which Band officials are defendants where declaratory and equitable relief is sought.

(e) The District Court of the Court of Central Jurisdiction shall have original jurisdiction over all criminal and civil matters except as otherwise provided for by law.

(f) The Court of Appeals shall have original jurisdiction over election disputes pursuant to the Minnesota Chippewa Tribal Election Ordinance and on issues certified to the Court of Appeals from foreign jurisdictions.

5 MLBSA § 113. Personal jurisdiction.

The Court of Central Jurisdiction shall have civil jurisdiction over any person, corporation, business organization or other private entity that:

(a) Transacts business with any member of the Band within the territorial jurisdiction of the Band;

(b) Engages in any activity which results in injury or property damage within the territorial jurisdiction of the Mille Lacs Band;

(c) Engages in any activity which results in a dispute over the ownership, use, possession or interest in any property within the territorial jurisdiction of the Band;

(d) Contracts to insure any person, property, corporation, business organization or risk located within the territorial jurisdiction of the Band;

(e) Enters into a written or verbal sales or service agreement within the territorial jurisdiction of the Mille Lacs Band or where performance of the agreement is to be within the territorial jurisdiction of the Mille Lacs Band;

(f) Engages in conduct that may affect the environment or territories under the jurisdiction of the Band or affects the natural resources of the Band or threatens the health, safety, peace or welfare of Mille Lacs Band or inhabitants thereof.

APPENDIX G

11 MLBSA § 9. Jurisdictional authority.

The Environmental Protection Commission shall exercise all the environmental jurisdiction possessed by the Non-Removable Mille Lacs Bands of Chippewa Indians as stated herein:

(a) The Non-Removable Mille Lacs Bands of Chippewa Indians shall exercise concurrent environmental jurisdiction with the United States of America over the air space encompassing all lands and waters subject to the jurisdiction of the Band.

(b) The Non-Removable Mille Lacs Bands of Chippewa Indians shall exercise concurrent environmental jurisdiction with the United States of America over all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation system, drainage systems and all other accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through or border upon lands of the Mille Lacs Bands of Chippewa Indians.

(c) The Non-Removable Mille Lacs Bands of Chippewa Indians shall exercise concurrent environmental jurisdiction with the United States of America over:

(1) all lands within the exterior boundaries of the Mille Lacs Reservation and Sandy Lake Reservation as established by the Treaty of 1855;

(2) all lands held in trust by the United States of America for the benefit of the Minnesota Chippewa Tribe, which are lawfully delegated to the jurisdiction of the Mille Lacs Bands; and, all lands held in trust by the United States of America for the benefit of the Non-Removable Mille Lacs Bands of Chippewa Indians;

(3) all lands subject to the jurisdiction of the Band pursuant to federal law, notwithstanding the issuance

of any patent, and including rights-of-way running through said lands;

(4) all individual allotments for the benefit of any member of. the Non-Removable Mille Lacs Bands of Chippewa Indians which are located within the exterior boundaries of the Mille Lacs and Sandy Lake Reservations as established by the Treaty of 1855;

(5) all lands held in fee status in the name of the Non-Removable Mille Lacs Bands of Chippewa Indians which are located within the exterior boundaries of the Mille Lacs and Sandy Lake Reservations as established by the Treaty of 1855.

(d) The criminal and civil jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians shall extend to all enrolled members of the Mille Lacs Bands of Chippewa Indians, enrolled members of the Minnesota Chippewa Tribe who reside within the territorial jurisdiction of the Mille Lacs Bands of Chippewa Indians, Indians from other tribes who enter the territorial jurisdiction, including Indian Country, of the Mille Lacs Bands of Chippewa Indians, Indians from other tribes who enter the territorial jurisdiction of the Mille Lacs Bands of Chippewa Indians by virtue of residency, employment or violation of Mille Lacs Band Statute(s) within the territorial jurisdiction of the Mille Lacs Bands of Chippewa Indians.

(e) The exercise of civil jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians over non-Indians, in environmental protection causes of action shall exist to the extent authorized by the laws of the United States of America. The criminal jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians shall not extend to non-Indians.

(f) The jurisdiction of the Non-Removable Mille Lacs Bands of Chippewa Indians shall extend to all persons, political sub-divisions and their officers and agents, public or private corporations, associations, partnerships

and any other individuals or entities who shall violate the environmental protection laws of the Band within the exterior boundaries of the Mille Lacs and Sandy Lake Reservations or on lands held in trust or fee status in the name of the Band, as authorized pursuant to the laws of the United States of America.

APPENDIX H

24 MLBSA § 101. Power to license.

The Corporate Commission shall have the sole power and authority to license commercial entities who sell or offer for sale any goods and/or services to person(s) on lands subject to the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians. Any persons(s), company(ies), corporation(s), association(s), partnership(s), cooperative(s), utility(ies) and any other public or private commercial entity who desires to sell or offer for sale any goods and/or services of any material value or to sell or offer for sale the exchange of property, real or personal, as defined in 24 MLBSA § 3302, with any Band member or Indian or any person subject to the jurisdiction of the Mille Lacs Band of Chippewa Indians; or with the Non-Removable Milie Lacs Band of Chippewa Indians; or any political sub-division or entity thereof, shall upon establishing the fact to the satisfaction of the Corporate Commission that he is a proper person or entity to engage in such activity, be permitted to do so under such rules and regulations as the Corporate Commission may prescribe through the issuance of lawful Orders of the Commission. Any such Commission Order shall not be applicable to any commercial entity during the term of any existing license but shall become effective upon the issuance of a new license or upon renewal of an existing license.

24 MLBSA § 103. Classes of Licenses.

The Non-Removable Mille Lacs Band of Chippewa Indians hereby designates the following classes of licenses which shall be available for any commercial entity who desires to engage in the sale of any goods and/or services on lands subject to the jurisdiction of the Band. The following classes of licenses shall be made available to any person, company, corporation, association, partner-ship, cooperative, utility, or financial institution, be it public or private who

seeks to engage in the sale of such goods or services on lands subject to the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians. The class of license sought shall be issued according to the classification of the goods and/or services sold on said lands.

(a) Retail Sales License. This license is available to a person who sells any goods and commodities at retail on lands under the jurisdiction of the Band.

(b) Entertainers License. This license is available to a person who provides entertainment to the public. For example: a band, theater or dance troupe, etc.

(c) Professional Services License. This license is available to a person who provides services in the practice of medicine and surgery, chiropractic, nursing, optometry, psychology, dentistry, pharmacy, podiatry, veterinary medicine, architecture, engineering, surveying, landscape architecture, accountancy and law.

(d) Utilities License. This license is available to a person providing telephone, electrical, water, sewer, gas to the public.

(e) Public Accommodations License. This license is available to a person providing lodging, prepared foods or beverages, and equipment rental to the public.

(f) Hawkers, Peddlers, Transient Merchants License. This license is available to a person who transacts any temporary and transient business on lands under the jurisdiction of the Band including selling goods, wares, merchandise and distributing literature of any type.

(g) General Service License. This license is available to a person who provides commercial services to the public, such as refuse disposal, plumbing, auto or equipment repair, electrical, carpentry, cleaning and maintenance services, personal care and other like general services.

(h) Special Events License. This license is available to a person who conducts commercial activity usually on a one time per annum basis, but not exceeding three times per annum. Said activity does not occur on a regular or consistent basis.

(i) Miscellaneous License. This license is available to a person who sells goods or services that do not fall into another category in subsections (a) to (h).

APPENDIX I

24 MLBSA § 2. Exclusive original jurisdiction.

(a) The Court of Central Jurisdiction is hereby conferred exclusive original jurisdiction over all civil causes of action, involving any person, where such grievance or dispute arises concerning any property, personal or otherwise, located on lands subject to the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians.

(b) The Court of Central Jurisdiction shall have exclusive original jurisdiction over all civil matters in which the Non-Removable Mille Lacs Band of Chippewa Indians, any of its political subdivisions or entities, or its officers, appointees or employees are parties in their official capacity. Nothing herein shall be construed as a waiver of sovereign immunity of the Band unless specifically authorized in accordance with Band law or by specific Band Statute.

24 MLBSA § 3. Concurrent jurisdiction.

The jurisdiction invoked by this chapter over any person, cause of action or subject shall be concurrent with any valid jurisdiction over the same of the Courts of the United States; provided, however, this chapter does not recognize, grant or cede jurisdiction to any other political or governmental entity.

24 MLBSA § 4. Application of Uniform Commercial Code of State of Minnesota

Pursuant to the provisions of 18 MLBSA § 301, the provisions of Minnesota Statutes Chapter 336, the Uniform Commercial Code, shall apply to any applicable civil causes of action which arise pursuant thereto.

24 MLBSA § 5. Truth in Lending Act.

The provisions of the laws of the United States of America relative to truth in lending as set forth in 15 USC 1601, *et seq.* shall apply to all persons who are creditors and lessors

as defined by the act. The justices of the Court of Central Jurisdiction shall be bound thereby to the provisions of said act.

24 MLBSA § 6. Consumer Protection Laws of State of Minnesota

The Consumer Protection Laws of the State of Minnesota shall apply as the Consumer Protection Laws of the Non-Removable Mille Lacs Band of Chippewa Indians. The justices of the Court of Central Jurisdiction shall be bound thereby to enforce the provisions of said Consumer Protection Laws.

APPENDIX J

24 MLBSA § 3309. Unlawful removal or disconnection of property.

Any creditor be they a person, company, corporation, association, partnership, cooperative, utility and any other public or private commercial entity, who absent a lawful order from the Court of Central Jurisdiction, who shall attempt to remove or disconnect any property from any person under the jurisdiction of the Band, shall be deemed to have committed a property trespass offense in violation of 2 MLBSA § 304(m) and the Solicitor General shall initiate civil action against said person seeking their removal and exclusion from lands under the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians for a period of time not to exceed 180 days.

* * * *

24 MLBSA § 3501. Applicability.

The replevin procedure set out in this subchapter shall be utilized for all cases before the Court of Central Jurisdiction.

24 MLBSA § 3502. Claim for immediate delivery of property

The plaintiff, in an action to recover the possession of personal property, at the time of issuing the summons or at any time before answer, may claim the immediate delivery of such property as provided in this subchapter.

24 MLBSA § 3503. Affidavit.

When an immediate delivery is claimed, an affidavit must be made by the plaintiff or by someone in his behalf stating that the plaintiff is the owner of the property claimed, is lawfully entitled to the possession of it, or that he had a lawful lien against such property, payment of which is in

default. The facts of such ownership or right to possession must be set forth along with a detailed description of the property. Said affidavit must state that the property is wrongfully detained by the defendant and that the alleged cause of the detention of the property, according to his best knowledge, information, and belief that the property has not been taken for a tax, assessment against the property of the plaintiff, or, if so seized, that it is by law exempt from such seizure. Said affidavit must also state the actual value of the property.

24 MLBSA § 3504. Direction to law enforcement officer.

The plaintiff, after completing and endorsing the affidavit required by 24 MLBSA § 3503, may require any law enforcement officer of the Non-Removable Mille Lacs Band of Chippewa Indians to take the property from the defendant and deliver it to the plaintiff.

24 MLBSA § 3505. Security furnished by plaintiff.

Before possession of any property may be taken by the plaintiff, he must furnish to the Court sufficient security in the form of cash or sureties. The surety shall be at least double in amount the value of the property as stated in the affidavit. If the defendant shall be later adjudged the rightful owner of the property or shall be entitled to possession of the property, the security provided by the plaintiff shall be used in any recovery by the defendant against the plaintiff.

24 MLBSA § 3506. Seizure of property.

Upon receipt of the affidavit, endorsement, and security by the Band law enforcement officer, the officer shall take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall keep it in a safe place and deliver it to the party entitled thereto upon receiving his lawful fees and necessary expenses for keeping the property. If the property of any part thereof be

concealed in a building or enclosure, the officer shall publicly demand its deliver. If it is not delivered, then the officer must obtain a search warrant from the Court of Central Jurisdiction.

24 MLBSA § 3507. Service on defendant.

The officer, at the time of taking any property, shall serve on the defendant a copy of the affidavit, endorsement, and proof of security or cash bond and notice of levy showing the property taken by delivering the same to the defendant personally, if he can be conveniently found, or to his agent from whose possession the property is taken; or if neither can be found, by leaving age and discretion.

24 MLBSA § 3508. Third party claims or return to defendant.

(a) If the property taken be claimed by any other person than the defendant or his agent, and such person shall make an affidavit of his title thereto and right to possession thereto, stating such right and title, and serve the same upon the officer, the officer shall not be bound to keep the property or deliver it to the plaintiff unless the plaintiff shall indemnify the officer against such claim by deposit with the Clerk of Court of security in amount and sufficiency as required in the original affidavit for the delivery. No claim to such property by any other person than the defendant or his agent shall be valid against the officer, unless made as provided; and notwithstanding such claim when so made, he may retain the property a reasonable time to demand such indemnity.

(b) The defendant may retain or require the return of the property by giving the Clerk of Court, within three (3) days after the taking, sufficient security or cash deposit of an amount not less than was required by the plaintiff for the delivery.

(c) If the defendant or a third party does not require a return of the property within three (3) days after the taking and service of papers on- the defendant, the property shall be delivered to the plaintiff.

24 MLBSA § 3509. Sureties and deposits.

(a) Sureties may be provided by any person or company allowed by the Court. Security may be given in the form of a cash deposit. A receipt shall be given by the Clerk of Court and the deposit shall remain in the custody of the Court until the Court shall make an order disposing of it.

(b) The defendant or plaintiff may require the surety of the other to prove the validity of their sureties. The plaintiff and defendant shall be given seven (7) days from date of service of a copy of the affidavit to question the validity of the surety. If it is not questioned within seven (7) days, it shall be deemed waived and cannot later be questioned by either party.

24 MLBSA § 3510. Officer's report.

(a) Within twenty (20) days after taking the property, the officer shall be notified by the Clerk of the Court in writing to make a verified report of his proceedings in taking and disposing of the property, and file the same together with the original affidavit, endorsement, or security and a notice of his copy of levy, with the Clerk of the Court.

(b) The failure or neglect of the officer to make such verified report of his proceedings shall not, however, void his proceedings under the affidavit and endorsement but shall render him liable for contempt of court.

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA FOURTH DIVISION

CIV. NO. 02-407 JMR/RLF

COUNTY OF MILLE LACS,
Plaintiff,

vs.

MELANIE BENJAMIN, *et al.*,
Defendants.

AFFIDAVIT OF B. P. ALLEN, JR.

STATE OF MINNESOTA)
)
COUNTY OF MILLE LACS)

B. P. Allen, Jr. states under oath as follows:

1. I am currently the Chairman and have served in the capacity of President, CEO and/or Director of the First National Bank of Milaca (the "Bank") for approximately 46 years.

2. The Bank is federally chartered and is located in Milaca, Minnesota.

3. The Bank was founded in 1897 and is a family-controlled business.

4. The Bank owns and operates a branch in Isle, Minnesota (the "Isle Branch").

5. The Isle Branch represents approximately one-third of the Bank's loans and deposits, and the Isle Branch has originated approximately 189 loans secured by approximately $11,000,000 in real estate.

6. The Bank's market area extends throughout the former Mille Lacs Reservation boundaries, including Kathio, South Harbor and Isle Townships

7. A substantial portion of the Isle Branch loans are secured by real estate located in Kathio, South Harbor and Isle Townships.

8. The Isle Branch does business with several members of the Mille Lacs Band of Chippewa (the "Band").

9. In 1992, the Band contacted Isle and Onamia area businesses and stated its intention to require all businesses operating within the boundaries of the former Mille Lacs Reservation to be licensed by the Band.

10. The Band recently contacted Isle and Onamia area businesses and stated that the Band has the power to regulate all commercial activities on lands subject to the Band's jurisdiction.

11. The Band's assertion of regulatory authority over property the Bank owns or on which it holds a security interest will depress the market value of that property. As a result, the Bank is concerned about taking a mortgage interest on property that is adjacent to land owned by the Band due to the potential for conflicting land use regulations. The Band's efforts to regulate dealings with its members, through its licensing system, will also affect the Bank's business and its profitability.

12. The Bank seeks to intervene in the County of Mille Lacs' action against the Band to protect the value of the property it owns or on which it has a security interest which will result if the former 1855 reservation is found to exist

along its original boundaries. Similarly, if the Band has the authority to license businesses within the area of the former 1855 reservation, the Bank's livelihood will be adversely affected.

13. Attached to my affidavit as Exhibits are true and correct copies of the following:

Exhibit 1: March 23, 1992 Letter from the Mille Lacs Band of Chippewa Indians;

Exhibit 2: Letter from Molly Big Bear on Behalf of the Mille Lacs Band of Chippewa Indians;

Exhibit 3: Milk Lacs Band Stat. Ann. Index 2, Title 18, § 103.

This concludes my affidavit.

By: B.P. Allen, Jr.
B.P. ALLEN, JR.

Subscribed to and sworn before me

This 3rd day of May, 2002.

/s/ Patricia A. Packard
PATRICIA A. PACKARD
Notary Public

EXHIBIT NO. 1

[SEAL]

MILLE LACS BAND OF CHIPPEWA INDIANS

Corporate Commission

March 23, 1992

Dear Madame/Sir:

The Corporate Commission Of the Miile Lacs Band of Ojibwe Indians is currently in the process of licensing all organizations doing business upon tribal lands. Tribal law requires all organizations to be licensed pursuant to Band Statute 1090-MLC-47.

It is the goal of the Corporate Commission and of the Band to establish an effective system of regulation concerning business transactions within the boundaries of tribal territories. To achieve this goal, all organizations must be issued vendors licenses.

A vendors license permits organizations to do business on tribal lands. Just as Minnesota licenses businesses, so too, does the Mille Lacs Band of Ojibwe Indians. The licensing statute's purpose (Section 1.01 of 1090-MLC-47) is as follows: The Band Assembly hereby finds and determines that the regulation and licensure of all persons, companies, corporations, associations, partnerships, cooperatives, utilities, and any other public or private commercial entity who engage in the sale of any goods and/or services with any constituent band of Non-Removable Mille Lacs Band of Ojibwe Indians is an effective way to regulate commercial activity on lands under the jurisdiction of the band and that such regulation is vital to economic security, political integrity and general welfare of the members of any constituent band of the Non-Removable Mille Lacs Band of Ojibwe Indians.

Section 7 of said statute list the fee schedule, which is based on the annual gross sales of business transactions done with the Band. A copy of the fee schedule is enclosed to aid in determining the fee sum. Also enclosed is the licensing application, which the organization will submit to the Corporate Administrator, along with the proper licensing fee. All organizations have 90 calendar days from the above date, in which to become licensed.

Should you have any questions or concerns, feel free to contact me at (612) 532-7777, Ext. 137. Thank you in advance for your cooperation.

Sincerely,

/s/ Melissa C. Hill
Corporate Administrator

EXHIBIT NO. 2

[SEAL]

MILLE LACS BAND OF CHIPPEWA INDIANS

Executive Branch of Tribal Government
Corporate Commission

Dear Madam/Sir

It is the goal of the Mille Lacs Band and the Corporate Commission of the Mille Lacs Band to establish an effective system of regulation concerning business transactions within the boundaries of tribal territories. To achieve this goal, the Corporate Commission of the Mille Lacs Band of Ojibwe Indians is currently in the process of updating all licenses of organizations doing business upon tribal lands.

According to the Mille Lacs Band Statutes Annotated (MLBSA), The Corporate Commission shall have the sole power and authority to license commercial entities who sell or offer for sale any goods and/or services to person(s) on lands subject to the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians. Any person(s), company(ies), corporation(s), association(s), partnership(s), cooperative(s), utility(ies) and any other public or private commercial entity who desires to sell or offer for sale any goods and/or services of any material value or to sell or offer for sale the exchange of property, real or personal, as defined in 24 MLBSA § 3302, with any Band member or Indian or any person subject to the jurisdiction of the Mille Lacs Band of Chippewa Indians; or with the Non-Removable Mille Lacs Band of Chippewa Indians; or any political subdivision or entity thereof, shall upon establishing the fact to the satisfaction of the Corporate Commission that he is a proper person or entity to engage in such activity, be permitted to do so under such rules and regulations as the Corporate Commission may prescribe through the issuance of lawful Orders

of the Commission. Any such Commission Order shall not be applicable to any commercial entity during the term of any existing license but shall become effective upon the issuance of a new license or upon renewal of an existing license.

When an application for a license or permit is filed with the Commissioner of Corporate Affairs, the application shall be accompanied by a non-refundable fee of ten dollars ($10.00). The Corporate Commission shall have ninety days from the date of filing to approve or deny any application Notwithstanding, the Commissioner of Corporate Affairs shall issue a temporary license valid for ninety days upon receipt and filing of said application. A Vendors license permits organizations to do business on tribal lands. Tribal law requires all organizations to be licensed pursuant to 18 MLBSA § 101. An Annual Vendor license renewal form will be issued the month prior to your Temporary License expiration date.

Enclosed you will find an explanation of the Classes of licenses, and a Temporary Vendor License application to do business with the Mille Lacs Band of Chippewa Indians. Please fill it out and return it to the address on the bottom, along with the $10.00 application fee.

If you should have any questions or concerns, please contact me at (320) 532-8832. Thank you for your cooperation and patronage.

Sincerely,

/s/ Molly Big Bear
MOLLY BIG BEAR
Business Regulation Officer
Corporate Commission

Enc.

EXHIBIT NO. 3

The Non-Removable Mille Lacs Band of Chippewa Indians hereby designates the following classes of licenses which shall be available for any commercial entity who desires to engage in the sale of any goods and/or services on lands subject to the jurisdiction of the Band. The following classes of licenses shall be made available to any person, company, corporation, association, partnership, cooperative, utility, or financial institution, be it public or private who seeks to engage in the sale of such goods or services on lands subject to the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians. The class of license sought shall be issued according to the classification of the goods and/or services sold on said lands.

(a) Retail Sales License. This license is available to a person who sells any goods and commodities at retail on lands under the jurisdiction of the Band.

(b) Entertainers License. This license is available to a person who provides entertainment to the public. For example; a band, theater or dance troup.

(c) Professional Services License. This license is available to a person who provides services in the practice of medicine and surgery, chiropractic, nursing, optometry, psychology, dentistry, pharmacy, podiatry, veterinary medicine, architecture, engineering, surveying, landscape architecture, accountancy and law.

(d) Utilities License. This license is available to a person providing telephone, electrical, water, sewer, gas to the public.

(e) Public Accommodations License. This license is available to a person providing lodging, prepared foods or beverages, and equipment rental to the public.

(f) Hawkers, Peddlers, Transient Merchants License. This license is available to a person who transacts any temporary and transient business on lands under the jurisdiction of the Band including selling goods, wares, merchandise and distributing literature of any type.

(g) General Services License. This license is available to a person who provides commercial services to the public, such as refuse disposal, plumbing, auto or equipment repair, electrical, carpentry, cleaning and maintenance services, personal care and other like general services.

(h) Special Events License. This license is available to a person who conducts commercial activity usually on a one time per annum basis, but not exceeding three times per annum. Said activity does not occur on a regular or consistent basis.

(i) Miscellaneous License. This license is available to a person who sells goods or services that do not fall into another category in subsections (a) to (h).

APPENDIX L

UNITED STATES DISTRICT COURT DISTRICT
OF M.INNESOTA FOURTH DIVISION

Civ. No. 02-407 JMR&LE

COUNTY OF MILLLE LACS and FIRST NATIONAL BANK OF MILACA,

Plaintiffs,

vs,

MELANIE BENJAMIN, *et al.*,

Defendants.

SECOND AFFIDAVIT
OF
B. P. ALLEN, JR.

STATE OF MINNESOTA)
)ss
COUNTY OF MLLE LACS)

B. P. Allen, Jr. states under oath as follows:

1. I am currently the Chairman and have served in the capacity of President, CEO and or Capital Director of the First National Bank of Milaca (the "Bank"). I have worked for the Bank for approximately 46 years. I have first hand knowledge of the facts in my affidavit and could, and would if called upon to do so, testify competently as to those facts.

2. I have reviewed my affidavit of May 3, 2002, submitted earlier in this case, I believe the facts I stated then were true and correct, and I believe they remain so today.

3. My grandfather moved into this area in 1903. I was born here, and I have lived continuously in the Milaca area since 1955, after my service in the Air Force. Based on my experience there has been no Indian reservation comprised of Kathio, South Harbor and Isle Townships. What anyone thought of a reservation, if it could even be called that, was in the Vineland area. I negotiated a purchase for my father in 1960 of lakefront property on south Mille Lacs Lake, and I never heard or had any idea the property was on a reservation.

4. The Bank is very concerned about the status of the former Mille Lacs reservation boundaries. This is specially the case for us because in Isle, the Bank competes directly with Woodlands National Bank, which is owned by the Band. If the Isle branch is deemed to be within the former 1855 reservation, and subject to tribal court jurisdiction, I am concerned that the Isle branch could be at a competitive disadvantage.

5. One important aspect of extending credit is the Bank's ability to perfect its security interest in loan collateral. The Bank's ability to perfect security interests and to exercise creditor remedies will be directly affected by the existence or nonexistence of the disputed reservation boundaries. The Bank is concerned that it might be subject to tribal court jurisdiction for lending activities with members of the Mille Lacs Band. The Bank does not want to be subject to tribal court jurisdiction, and the Bank does not want to be deprived of any rights or remedies it is granted under Minnesota's version of the Uniform Commercial Code. If the Bank is deemed to be under tribal court jurisdiction, its ability to enforce its

rights as a secured creditor will be impacted regardless of whether the borrower is a Bandmember or not..

6. The Bank is also subject to a number of federal laws that regulate its day-to-day operations, including the Truth In Lending Act, the Equal Credit Opportunity Act and the Community Reinvestment Act. The Bank needs to know with certainty where and how these laws will be enforced and applied to manage its banking activities.

7. The Bank's Isle Branch makes a substantial amount of its commercial loans within the disputed reservation boundaries.

This concludes by affidavit.

By: B.P. Allen, Jr.
B.P. ALLEN, JR.

Subscribed to and sworn before me
This 12th. day of November, 2002.

/s/ Patricia A. Packard
PATRICIA A. PACKARD

Notary Public

APPENDIX M

[Logo] The Minnesota Chippewa Tribe

September 17, 2002

MEMORADUM

TO: County Treasurer

FROM: Rick Wubri, Director

SUBJECT: Property Tats for Indian-Owned Lands

As per our memorandum dated May 12, 1989, the payment for taxes on lands within the reservation boundaries are hereby, again being paid under protest.

If you have further questions regarding the payments under protest, please contact Mr. Larry A. Kimball, attorney for The Minnesota Chippewa Tribal Housing Corporation at P.O. Box 1240, Walker, Minnesota 56484, 218/547-3787.

APPENDIX N

THE MILLE LACS BAND OF
OJIBWE INDIANS
Executive Branch of Tribal Government

October 19, 2000

Ms. Barbara Kiel
Solid Waster Officer/Zoning Administrator
Courthouse Annex
635 Second Street SE
Milaca, MN 56353

RE: Application for Solid Waste Hauler's License

Dear Ms. Kiel:

Enclosed herewith please find the Mille Lacs Band of Ojibwe's application for a Solid Waste Hauler's License. The Band submits this application under protest and reserves the right to contest the lawfulness of the applicability of Mille Lacs County's Solid Waste ordinance to the Band at a future date. The enclosed application should not be construed as an admission by the Band that the County has regulatory authority over the Band, its members or the land in question.

If you have any question, please contact me at 320-279-1702.

Sincerely,

/s/ Sheldon Boyd
SHELDON BOYD
Commissioner of Administration

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CIV. NO. 02-407(JMR/RLE)

MILLE LACS COUNTY and FIRST NATIONAL BANK OF MILACA,
Plaintiff,

vs

MELANIE BENJAMIN, individually and officially as Chief Executive, Mille Lacs Band of the Chippewa Indians, *et al.*
Defendants.

EXPERT REPORT OF

Roger Wagner

I. Qualifications

I am a licensed real estate appraiser and the owner of Circle 6 Appraisal Service in Milaca, Minnesota. I have been retained by the First National Bank of Milaca to offer an opinion whether the claimed continuing existence of the Mille Lacs Indian reservation which is at issue in this litigation has decreased the fair market value of real estate in the disputed area.

I am qualified to offer my opinions on this matter by my experience and training. Attached is a copy of my Resume, which summarizes my education, experience, licensing, and membership in professional organizations.

To receive and maintain my license from the Minnesota Department of Commerce, I have completed continuing education classes and testing in appraisal techniques and mathematics. I have been in the appraisal business since

1982. I personally perform approximately 250 appraisals of real and personal property each year.

My business, Circle 6, performs real estate and personal property appraisals for a variety of purposes, including bankruptcy proceedings, mortgage foreclosures, arson investigations, estate planning, divorce proceedings, and real estate transactions. Circle 6 employs 13 full time appraisers, seven of whom work from our Milaca office. Circle 6 has performed more than 11,000 appraisals. In the course of my work as an appraiser and owner of Circle 6, I monitor real estate prices in the Milaca area, including land which may be within reservation boundaries depending on the outcome of this case. I am familiar with real estate transactions in the disputed area, and have done appraisals of residential real estate in that area, as well as businesses such as gift shops, sports bars and marinas.

II. Compensation

The Bank has agreed to compensate me at the rate of $75 per hour for work performed in this case.

III. Listing of Any Testimony in Other Cases

I have not provided expert testimony in any previous case.

IV. Statement of Opinions to Be Expressed, and Basis and Reasons Therefor

In my opinion, the uncertainty concerning the continued existence of the reservation has decreased the value of real estate in the disputed area, relative to comparable properties outside the area. The basis and reasons for my opinion follow.

In the typical appraisal of real property, an appraiser has available three methodologies for appraising property value. One of these is the income approach, by which the income from a property forms the basis for determining fair market value of a property. At its core this method is a capitalization

of a net income based on a discount value that reflects the risk associated with producing the income. Another method to assess the value of a property is the cost of construction method. As the term implies, it bases value on the initial cost of construction, but can be adjusted to reflect current construction costs. The final method typically used is to compare the property being appraised to comparable properties which have recently sold to determine the fair market value. In that method, because properties are rarely mirror images of each other, the appraiser must make adjustments to the parcels that comprise the comparable parcels to which to appraise the subject property. For commercial properties those adjustments could include, among other possible factors: traffic counts, access, visibility or parking. Other adjustments could be for building square footage or age of construction.

I was asked to address whether or not there is a negative affect on property values arising from the dispute concerning whether the Mille Lacs Band continues to have a reservation as defined by the 1855 Treaty with the United States and whether the Mille Lacs Band can exercise its tribal authority within that same area. In order to reach a conclusion whether that dispute has had any effect on properties within the disputed area, I do not need to perform a specific appraisal. Of the three methods typically used by appraisers, I believe the cost of construction method would be generally irrelevant to an analysis of whether there is an effect on value because of the dispute. The income method conceivably could be applicable, but because the dispute has only recently emerged as a significant public controversy within Mille Lacs County, ascertaining whether there has been an impact on the income of properties within the disputed area could be difficult to ascertain. I do know, however, that resorts on Lake Mille Lacs have closed.

The clearest method to establish whether the reservation dispute has affected property values would be through the comparable sales method. Here, as I have noted, I would be making adjustments to a recent property sale to make the sales comparable. It is my professional opinion that I would include in making these adjustments whether or not properties lie within the disputed area in order to appraise a property within the disputed area. It is also my opinion that, until resolved, the existence of this dispute has created uncertainty, in particular for commercial properties, and has negatively affected value. I believe that the negative impact is at least ten percent. Thus, performing a comparable sales approach, I would discount commercial properties, and possibly residential parcels, if they are within the disputed area.

The reasons why I would conclude that there is a negative impact on value within the disputed area is:

1. Uncertainty concerning land ownership rights has an adverse impact on real estate values. In the course of my appraisal practice, I have become aware that a number of lenders have expressed concern whether "clear title" can be obtained on real estate in the disputed area.

2. Public advertisements for residential real estate on Lake Mille Lacs indicate it is a "selling point" if the property is not in the disputed area. This indicates that property in the disputed area tends to have a lower market value than property outside the area, all else being equal.

3. In commercial real estate transactions involving property within the disputed area, parties have expressed concern that they may be regulated and subject to taxation by the Tribal Council. Some owners have indicated they intend to let their property "go back" to lenders if it is determined to be within the reservation boundary.

4. A commercial property located within the disputed arm (J & M Marine) sold in July of 2002 for $370,000. In performing an appraisal on that property. I found a value of $422,700 using the cost of construction approach, $481,650 using the income approach based on the owner's records, and $430,000 using the comparable sales method, with properties in Milaca, Mora and Alexandria as the comparable sales. In my opinion, the markedly low sales price of this property is attributable to the reservation dispute.

I am aware that the First National Bank of Milaca has a building in Isle, Minnesota which is within the disputed area. Its presence within the disputed area would be a negative factor appraising its value. I also understand that the bank has collateral in the form of real estate mortgages on properties within the disputed area. The value of this collateral, too, would be negatively affected by the dispute in the amount I stated earlier, by at least ten percent.

V. Data and Other Information Considered

In forming my opinion, I have considered county records concerning the sales prices of real estate inside and outside the disputed area, which I regularly review in the course of my profession, published real estate advertisements, and information gathered in the course of performing appraisals both inside and outside the disputed area. One example of the disclosures now being made for real estate sales is attached to my report as Exhibit A.

/s/ Roger Wagner
ROGER WAGNER

APPENDIX P

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No.: CV 02-407 JMR/RLE

COUNTY OF MILLE LACS,

Plaintiff,

vs.

MELANIE BENJAMIN, *et al*

Defendants.

AFFIDAVIT OF
DR. BRUCE A. SCHROEDER

STATE OF MINNESOTA)
) SS:
COUNTY OF RAMSEY)

1. My name is Dr. Bruce A. Schroeder, and I practice medicine in Omaha, Nebraska where I live with my wife, Cinda J. Schroeder.

2. In 1994, my wife and I purchased 8.25 acres of undeveloped land on Cove Bay, which is on the south shore of Lake Mille Lacs. The legal description of the property is Government Lot 1, Section 16, Township 42, Range 26, Mille Lacs County, Minnesota. We are specifically located in South Harbor Township.

3. Our purpose in purchasing the land was to build a home for our seasonal use and ultimately to serve as our permanent residence in retirement. My wife and I had no idea that this property was located within what the Mille Lacs Band claims is their reservation at the time we purchased the land.

4. In 1995, we had a roadway constructed onto the property so that we could begin preparation for the construction of our home. At that point, we were contacted by representatives of the Mille Lacs Band, and particularly Elisse Aune, who identified herself as Exhibit 9 the Band's historian. Ms. Aune informed us that the land we had purchased contained Indian burial grounds and we could not proceed with our construction plans.

The State Archaeologist, Mark Dudzik, told me that the Mille Lacs Band claimed my property was in Indian Country and I could not do anything until he responded to the Band's claims and investigated, which could take years.

5. Given this claim by the Mille Lacs Band, I offered several times to sell the property to the Mille Lacs Band for what I had paid for the property, but the Band never responded. Nevertheless, the Band put pressure on the Mille Lacs County officials to prevent them from issuing building permits until we could prove that there were no Indian burial grounds in this location. I was told that I needed to deal with the Mille Lacs Band on these issues. I obtained a map showing the location of Indian burial mounds around Lake Mille Lacs, and none were shown on my property. The Band would not accept this evidence.

6. As a result of the efforts of the Mille Lacs Band, and the control they asserted over the development of my property, I was not able to begin my construction activities until I was able to demonstrate that there were no Indian burial grounds in the area. Ultimately, I was able to get the State

Archaeologist's office to conduct an investigation in August 1998. Because I live in Omaha, Nebraska, I was also forced to hire an attorney in Minnesota to oversee this investigation process.

7. On the first day that the State Archaeologist's office and their investigators were at the site, and my counsel was there, they were prevented from conducting any investigation activities while they awaited the arrival of a representative of the Band to participate in the process. The State Archaeologist, the archaeologist firm he had contracted with, and the attorney I paid on an hourly basis, waited that entire day for representatives of the Band, which we understood would include Elisse Aune, to show up.

8. We were also told that the Band was going to send a traditional healer/medicine man (as he was described to us) to my property to point out the locations of burials. He failed to appear the first day, or any other day.

9. Both the State Archaeologist's office, my counsel and archaeological crew members waited the entire morning and into the early afternoon of the second day for a tribal representative and the traditional healer/medicine man to show up, but again they failed to appear. Finally, at the insistence of my counsel, the State Archaeologist and the others present began their investigation. At no time did tribal representatives show up to participate in the process, even though the process was undertaken at their insistence and held up at their request.

10, The Mille Lacs Band also dictated the manner in which the investigation could take place, insisting that excavation or other investigation means that could disturb burials could not be used. The practical result was that the archaeologists were limited to using means such as metal detectors (Ojibwe burials sometimes included metal objects), and other non-intrusive techniques. This occurred despite the fact that the

State Archaeologist was of the opinion that definitive assessment of the burials would require controlled stripping of overlying soils.

11. After the State Archaeologist's office found no evidence of burials, I was able to proceed with my construction activities after a three year delay. Nevertheless, because the Band insisted that non-invasive techniques could only be used, I was informed that if my excavation encountered burials, I would have to stop the construction process. Our construction activities, where all soil excavation was overseen by an archaeologist, encountered no evidence of burial grounds.

12. The Band's insistence that they had rights to control this process, which arose from their assertion that this property was located on a reservation, denied me full and free use of the property for over three years. If the Mille Lacs Band had not been asserting that it was within a reservation, I could have quickly, and much earlier, demonstrated that there was no evidence of Indian burials in this area.

13. These activities by the Mille Lacs Band interfered with my use and enjoyment of the property, and I believe were designed to stop all development in this area of their claimed reservation by persons who are not tribal members. As a result, it cost me thousands of dollars more to build my home.

14. As a landowner, I believe that the value of this real estate has been negatively impacted by the continuing claims of the Mille Lacs Band that the property is located within a reservation, and the value of the real estate will continue to suffer this negative impact until the issue of reservation station is resolved.

/s/ Bruce A. Schroeder
BRUCE A. SCHROEDER

Subscribed and sworn to before me this
1st day of November, 2002.

/s/ Judith L. Kaderlik
JUDITH L. KADERLIK
NOTARY PUBLIC.

APPENDIX Q

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No.: CV 02-407 JMWRLE

COUNTY OF MILLE LACS,

Plaintiff,

vs.

MELANIE BENJAMIN, *et al.*

Defendants.

STATE OF MINNESOTA)
)
COUNTY OF RAMSEY)

AFFIDAVIT OF CINDA J. SCHROEDER

1. My name is Cinda J. Schroeder and I currently reside with my husband, Dr. Bruce A. Schroeder, in Omaha, Nebraska.

2. In 1994, my husband and I purchased 8.25 acres of undeveloped land on Cove Bay on the south shore of Lake Mille Lacs. The legal description is Government Lot 1, Section 16, Township 42, Range 26, Mille Lacs County, Minnesota. We purchased the land with the plan to develop it for seasonal use initially and then as our retirement home.

3. In the summer of 1995 we constructed a road into the property, in order to enable us to begin construction of our home.

4. After the road was put in, my husband and I received communications from the Mille Lacs Band claiming that we could not develop the property because there were Indian

burial grounds in the area. Attached is an envelope I saved from Elisse Aune from the Mille Lacs Band evidencing these communications.

5. I remember a specific meeting where Elisse Aune, who holds the title of historian or some other similar title with the Mille Lacs Band, came out to the property and told me that the property was located within the Mille Lacs Reservation, we were subject to tribal laws governing this land, and the Mille Lacs Band had control over our development plans. Specifically I was told we could not clear the land or do any other development. This claim was very upsetting to me. Even more upsetting was the pressure put by the Mille Lacs Band on County officials to prevent them from issuing construction permits until we could prove that there were not Indian burial mounds in the area.

6. As a result of these pressures and interference by the Mille Lacs Band, we were not able to begin constructing our home for over three years, until we were able to get the State Archaeologist's office to investigate and confirm, in August, 1998, that there was no evidence of Indian burials that could be found in the area where we wanted to build our home.

7. My husband has submitted an Affidavit that has additional information on these matters.

Further affiant saith not.

/s/ Cinda J. Schroeder
CINDA J. SCHROEDER

Subscribed and sworn to before me this
1st day of November, 2002.

/s/ Judith L. Kaderlik
JUDITH L. KADERLIK
Notary Public

APPENDIX R

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

[Filed Jun. 26, 2002]

Civ. No. 02-407 (JMR/RLE)

COUNTY OF MILLE LACS,

Plaintiffs,

vs.

MELANIE BENJAMIN, individually and officially as Chief Executive Mille Lacs Band of Chippewa Indians; HERB WEYAUS, individually and officially as Secretary / Treasurer, Mille Lacs Band of Chippewa Indians; SANDRA BLAKE, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; MARVIN BRUNEAU, individually and officially as District Representative, Mille Lacs Band of Chippewa Indians; and HARRY DAVIS, individually and as District Representative, Mille Band of Chippewa Indians,

Defendants,

and

FIRST NATIONAL BANK OF MILACA,

Movant for Intervention.

At Duluth, in the District of Minnesota, this day of June, 2002.

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b)(1)(A), upon the Motion to Intervene by the First National Bank of Milaca ("FNB"). FNB's Motion was filed on May 8, 2002, with a Hearing on the Motion set for June 6,

2002. In the interim, however, the Court had been advised that neither the Plaintiff, nor the Defendants, opposed the Motion. Thus, after reviewing the Memoranda provided by all par-ties involved, as well as the applicable law, we conclude that a Hearing on the Motion is unnecessary, and we grant FNB's Motion to Intervene on the written Record.

Under Rule 24(a)(2),[1] Federal Rules of Civil Procedure, anyone has the right to intervene in an action upon timely application:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In practical terms, "a party seeking mandatory intervention must establish that it: (1) ha[s] a recognized interest in the subject matter of the litigation that (2) might be impaired by the disposition of the case and that (3) will not be adequately protected by the existing parties." *Standard Heating and Air Conditioning Co. v. City of Minneapolis*, 137 F.3d 567, 571 (8th Cir. 1998) [alteration in original], quoting *Mausolf v. Babbitt*, 85 F.3d 1295, 1299 (8th Cir. 1996).

A "recognized interest" must be "'direct,' as opposed to tangential or collateral," and "both `substantial' and 'legally protectable.'" *United States v. Union Elec. Co.*, 64 F.3d 1152, 1161 (8th Cir. 1995), citing *S.E.C. v. Flight Transp. Corp.*, 699 F.2d 943, 949 (8th Cir. 1983). To show that the interest might be impaired by the disposition of the case, an

---

[1] Rule 24(a)(1), Federal Rules of Civil Procedure, permits intervention of right "when a statute of the United States confers an unconditional right to intervene." The Movant does not reference or rely upon any such statute, and we find this basis for intervention of right to be inapplicable.

intervenor need only show that "the disposition of the action may as a practical matter impair or impede the applicant's ability to protect [its] interest." *Kansas Pub.. Employees RetiremQnt Sys. v. Reimer & Koger Associates, Inc.*, 60 F.3d 1304, 1307 (8th Cir. 1995); cf., *S.E.C. v. Flight Transp, Corp.*, supra at 948 (threatened loss in market value of intervenors' homes sufficient). Moreover, the movant "need not show that, but for its intervention, its interest 'would be' impaired by the operation of res judicata, collateral estoppel, or stare decisis, but rather only that its interest 'may be' so impaired." *Kansas Pub. Employees Retirement Sys. v. Reimer & Koger Associates, Inc.*, supra at 1307. The intervenor bears the burden, albeit a minimal one, of showing inadequacy of present representation of its interests. See, *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1996). At bottom, Rule 24 should be liberally construed, with all doubts to be resolved in favor of the proposed intervenor. See, *Kansas Pub. Employees Retirement Sys. v. Reimer & Roger Associates, Inc.*, supra at 1307.

Here, the Plaintiff filed a Complaint, which seeks a declaration that the exterior boundaries of the 1855 Mille Lacs Indian Reservation were disestablished, or diminished, by specific Federal Treaties and Statute. The ostensible cause for the suit is the apparent claim of the Mille Lacs Band of Chippewa Indians ("the Band") that the former Reservation, which was once established by Treaty in 1855, between the United States, and the Chippewa Indians,. continues to exist. According to FNB, based on this belief, the Band has asserted regulatory authority over businesses operating within the boundaries of the "former" Reservation. The assertion of regulatory power extends to FNB, which has property and substantial business, including the Band members, within the 'former" Reservation boundaries. Thus, FNB seeks to intervene in order to protect its rights and interests, and

argues that, but for its intervention, it rights and interests could be detrimentally impacted by a decision on reservation's status.

In that respect, FNB argues that this case is analogous to *Mille Lacs Band of Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993), where our Court of Appeals considered whether Counties, and landowners, could intervene in an action between the Mille Lacs Band of Chippewa Indians, and the State of Minnesota, which concerned the Mille Lacs Band's hunting, fishing, and gathering rights, on land which had been previously ceded to the United States by Treaty. *Id.* at 996-98. There, the intervenors argued that the case could affect their property values or interests, since a decision favorable to the Mille Lacs Band could permit the Band members to exercise fishing, hunting, and gathering rights, allegedly reserved by Treaty, upon the proposed intervenors' land. *Id.* at 998. The Court concluded that intervention, under Rule 24(a), was appropriate, as both the County and the landowners had an interest in the land that they owned which could have been affected by the litigation. *Id.* at 1001. Moreover, the respective interests of the Counties, and the landowners, were found to be narrower than those of the State defendant and, as a consequence, the Court determined that those interests were not adequately represented by the State. *Id.*

We are bound by the Court's reasoning in *Mille Lacs Band of Indians v. Minnesota*, supra, which compels the grant of the Motion to Intervene. Here, FNB not only owns property within the "former" Reservation boundaries, but also has a legal interest, through loans, in a large amount of the property that could be affected by the disposition of this litigation. Moreover, as FNB does business within the "former" Reservation boundaries, and with the Band members, the Band's intent to regulate businesses within those boundaries could certainly affect FNB. Finally, FNB's interest is more

narrow, and individualized, than the Plaintiff's interest, and, therefore, is not adequately represented by the Plaintiff. Accordingly, we conclude that FNB's timely-filed Motion to Intervene is proper, and should be granted.

NOW, THEREFORE, It is—

ORDERED:

1. That the Motion of First National Bank of Milaca to Intervene as a Plaintiff [Docket No. 13] is GRANTED.

2. That the First National Bank of Milaca shall, forthwith, serve and file a copy of its proposed Complaint, in accordance with the applicable Rules of Civil Procedure.

BY THE COURT:

/s/ Raymond L. Erickson
RAYMOND L. ERICKSON
UNITED STATES MAGISTRATE JUDGE

(3) (3)

SEP 2 0 2004

Nos. 04-228 & 04-229

IN THE

Supreme Court of the United States

FIRST NATIONAL BANK OF MILACA,

Petitioner,

-and-

COUNTY OF MILLE LACS,

Petitioner,

v.

MELANIE BENJAMIN, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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Petitioners County of Mille Lacs ("County") and First National Bank of Milaca ("Bank") sued respondents, five officials of the Mille Lacs Band of Ojibwe Indians ("Band"), for a declaration that the Mille Lacs Indian Reservation has been disestablished. After discovery, respondents moved for summary judgment on jurisdictional grounds. The district court, in a detailed opinion, held petitioners lacked standing and the case was not ripe. Bank App. 9a-27a (Rosenbaum, C.J.). On *de novo* review, a unanimous Eighth Circuit panel held "the district court correctly concluded [petitioners] lacked standing" and ordered the case dismissed without prejudice. *Id.* 4a, 5a, 7a (Riley, Bowman, and Smith, JJ).

In reaching these conclusions, the district court and court of appeals applied well-settled principles governing Article III standing. *Petitioners do not challenge (or even discuss) these principles*. Instead, they point to cases in which courts have resolved reservation disestablishment claims on the merits. However, the fact that courts have resolved such claims in other cases does not demonstrate petitioners had standing in this case. Federal courts have had no difficulty in applying the standing requirement in reservation disestablishment cases, and the lower courts' determination that petitioners lacked standing in this case conflicts with no decision of this or any other court. Because the consistent, straightforward application of settled principles of standing in reservation disestablishment cases does not present an important federal question requiring this Court's intervention, the dismissal of this case without prejudice does not warrant *certiorari*.

STATEMENT OF THE CASE

1.

In the early 1980s, the Mille Lacs Band formed a separation-of-powers government, and began adopting written statutes regulating its affairs. *See* Resp. 8th Cir. App. 170. Most of these statutes were adopted in the mid-1980s, nearly 20 years ago, and were re-codified and published in 1995. *Id.* 168, 170, 213-14.

The Band's statutes do not assert jurisdiction over all persons within the boundaries of the Mille Lacs Indian Reservation, as established in 1855. Rather, they typically apply to persons and on lands or territories "under the jurisdiction" of the Band. *See, e.g.*, 2 MLBSA §§ 3001(a), 3003 (exclusion ordinance) (Bank 8th Cir. App. 93-94); 5 MLBSA §§ 101, 111(b), 113 (Band court jurisdiction) (Bank 8th Cir. App. 107-12); 11 MLBSA § 1002 (solid waste regulation) (Bank 8th Cir. App. 242); 18 MLBSA § 101 (business licensing) (Bank 8th Cir. App. 67); 24 MLBSA § 1 (civil causes of action) (Bank 8th Cir. App. 117); 24 MLBSA §§ 3301, 3309 (creditor remedies) (Bank 8th Cir. App. 181-84). This approach is common in Indian country, where the personal and territorial scope of tribal jurisdiction can vary depending on who (tribal members, nonmember Indians, or other nonmembers) is being regulated and the purpose of the regulation, and can vary over time depending on judicial decisions, the acquisition of trust lands, and other factors.

In 1978, this Court held tribes lack criminal jurisdiction over nonmembers. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Since then, the Court has held tribes generally lack *civil* jurisdiction over nonmembers as well:

"Where nonmembers are concerned, the 'exercise of tribal power *beyond what is necessary to protect tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'" *Nevada v. Hicks*, 533 U.S. 353, 359 (2001), quoting *Montana v. United States*, 450 U.S. 544, 564 (1981) (emphasis added by the *Hicks* Court).

Thus, when it comes to nonmembers, a tribe's "territorial jurisdiction" is not co-extensive with its reservation boundaries. For example, in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), the Court held a tribe could not tax a nonmember doing business on non-Indian fee land within a reservation. The Court stated an "Indian tribe's sovereign power to tax – whatever its derivation – reaches no further than *tribal* land." *Id.* at 653 (emphasis added). Indeed, the *Hicks* Court observed that "[h]itherto, the absence of tribal [land] ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." 533 U.S. at 360.

For these reasons, the Band's statutes cannot fairly be read as asserting jurisdiction over nonmembers throughout the 1855 Reservation. The Band's current Chief Executive, Melanie Benjamin, interprets references in the Band's statutes to the "territorial jurisdiction" of the Band and to "property subject to the jurisdiction of the Band" as references to *Band-owned* lands. Resp. 8th Cir. App. 181c-d. In light of this Court's decisions, Ms. Benjamin believes the Band's statutes "pertain to the members of the Mille Lacs Band Reservation. The enrolled members. And how we govern ourselves. So, with that, the answer [is] that those laws are directed towards the members of the Mille Lacs Band." *Id.* 179.

2.

Although they have been on the books for nearly 20 years, the Band has *never* applied or threatened to apply its laws to the County or the Bank. The Band only applies its laws to nonmembers who choose to do business with the Band on Band lands. This assertion of jurisdiction does *not* rest on the status of the 1855 Reservation.

For example, within the Band's separation-of-powers government, its Corporate Commission has "the sole power and authority to license commercial entities who sell or offer for sale any goods and/or services to person(s) on lands subject to the jurisdiction of the [Band]." 18 MLBSA § 101 (Bank 8th Cir. App. 67). A person or entity who desires to sell goods or services to the Band, a Band member or "any person subject to the jurisdiction of the [Band] . . . shall . . . be permitted to do so under such rules and regulations as the Corporate Commission may prescribe." *Id.*

Under these provisions, the Band's Corporate Commission developed a business-licensing program in the early 1990s, coincident with the development of the Band's casino gaming enterprises. Resp. 8th Cir. App. 127 (¶ 4). The licensing program was designed to collect background information on persons doing business with the Band, to enable the Band to protect the reputation and viability of its casinos. *Id.* The Commission's requirement that businesses obtain a Band license was *not* based on a business's location within the 1855 reservation; the requirement was applied only to businesses that chose to provide goods or services to the Band on Band lands. *Id.* (¶¶ 3-4).

The Bank focuses on, but mischaracterizes, two letters regarding the Band's licensing program. Bank Pet. at 9. In a March 23, 1992, letter, the Band's Corporate Administrator wrote that the Corporate Commission was "in the process of licensing all organizations doing business upon *tribal* lands." Bank App. 60a (emphasis added). The letter quotes the preamble to the Band's licensing statute, in which the Band's legislative body found that licensing persons and entities "who engage in the sale of any goods and/or services with *any constituent band* of the Non-Removable Mille Lacs Band of Ojibwe Indians is an effective way to regulate commercial activity on lands under the jurisdiction of the band." *Id.* (emphasis added). The letter was sent only to those persons and entities that had business dealings with the Band, Resp. 8th Cir. App. 127 (¶ 3), and, as the Bank admitted, was not sent to the Bank. *Id.* 124 (¶ b).

In a 2001 letter, the Corporate Commission's current Business Regulation Officer, Molly Big Bear, wrote that it is the Band's goal "to establish an effective system of regulation concerning business transactions within the boundaries of tribal territories." Bank App. 62a. The letter states the Commission is "in the process of updating all licenses of organizations doing business upon *tribal lands*," and encloses a "Temporary Vendor License application *to do business with the Mille Lacs Band* of Chippewa Indians." *Id.* 62a-63a (emphasis added). Like the 1992 letter, Ms. Big Bear's letter was "sent *only* to those business entities – whether located on or off [the] Reservation – that have expressed an intent to do business with the Band." Resp. 8th Cir. App. 32 (¶ 5). The Bank admitted it did not receive this letter either. *Id.* 124(¶ b).

Ms. Big Bear testified in a deposition that her understanding of the phrase "within the boundaries of tribal territories" refers to the "1855 boundaries," and that, under 18 MLBSA § 101 the Band's Corporate Commission "has the *power* to license anyone who wishes to provide goods or services to any member of the Mille Lacs Band." Resp. 8th Cir. App. 185, 190 (emphasis added). Ms. Big Bear also testified, however, that the Corporate Commission has never exercised this alleged power, but instead has sought only to license those businesses that are doing business with the Band. *Id.* 32-33 (¶¶ 4-9), 186, 188, 191-95. There is no evidence the Band has *ever* sent a license application to a business that was not seeking to do business with the Band, that is has *ever* told such a business that it was required to obtain a license from the Band, or that it has *ever* taken *any* action against such a business because it did not obtain a license from the Band.

3.

Soon after this Court affirmed the Band's treaty hunting, fishing and gathering rights in *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999), the Band's opponents began claiming the Band was threatening to regulate non-Indians on non-Indian lands within the 1855 Reservation. In January 2000, then-Mille Lacs County Attorney Janelle Kendall found "widespread *misinformation*" about the Band's ability to tax, prosecute and zone non-Indians was creating civic unrest and a public safety risk. Resp. 8th Cir. App. 69, 73 (emphasis added). Concerned that County residents were being "intimidated or pressured . . . to participate in political activity currently underway regarding these issues," Ms. Kendall undertook to advise the County Board "regarding the general legal ability of the Mille Lacs Band to affect the daily living situation of non-Indian County residents." *Id.* 69.

Ms. Kendall found the Band had *not* sought to tax or regulate any businesses other than those that chose to do business with the Band. *Id.* at 70. Further, she stated that, other than regulation of underground injection wells, she was "unaware of the Mille Lacs Band ever attempting to exercise any other civil or regulatory jurisdiction, including attempted taxation, regarding *any non-Indian* in Mille Lacs County." *Id.* at 70-71 (emphasis in original).[1] Based on her analysis of the Band's legal authority, Ms. Kendall concluded that, even if the Reservation continued to exist, the Band could not tax, zone or prosecute non-Indians within its boundaries. *Id.* 71-72.

Ms. Kendall's memorandum notwithstanding, the County retained outside counsel and filed suit against five Band officials in 2002, seeking a declaration that the original boundaries of the Mille Lacs Reservation have been disestablished. County 8th Cir. App. 44. The Bank intervened seeking the same relief. Resp. 8th Cir. App. 24. Neither disputed the "reservation" or "Indian country" status of trust lands within the original Reservation boundaries. Bank App. 11a.[2]

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1. Although the Environmental Protection Agency ("EPA") had approved the Band's application to develop a program regulating underground injection wells on the Reservation, the Band never adopted the program. Instead, it negotiated with EPA and the Minnesota Pollution Control Agency ("MPCA") for continued *Federal* regulation of such wells, with technical assistance from the Band and MPCA. Resp. 8th Cir. App. 151 (¶ 25). The Band has applied for "treatment-as-a-state" status under other environmental programs so that it can receive research and development funding from EPA, but has not sought to implement any other regulatory program. *Id.* 198-201.

2. *After* this lawsuit was filed, local real estate agents began disclosing that *the County* had filed a lawsuit "in a dispute over the boundaries" of the Reservation, while noting that the "Band has stated publicly that [it] *would not* have jurisdiction or taxing power over non-band members who own property in the disputed area." County App. 206a (emphasis in original).

After completion of initial discovery, respondents moved for summary judgment on standing, ripeness, sovereign immunity and indispensable party grounds. The district court dismissed the case, finding petitioners lacked standing and the case was not ripe. Petitioners' primary claim of injury arose out of threatened regulation by Band ordinances. Bank App. 16a. The court found this claimed injury was not "actual, concrete, or imminent," since the Band had "neither threatened nor demonstrated an intent to enforce its ordinances beyond its 4000 acres [of trust lands]." *Id.* 16a-17a. Nor did the text of the Band ordinances cited by petitioners establish threatened or pending enforcement, since they contained only one reference to the 1855 Reservation and asserted jurisdiction only to the extent authorized by Federal law. *Id.* 18a & n.8.

The court likewise rejected the County's claim that its ability to protect public safety had been harmed. The County Sheriff's deposition testimony indicated the Band had taken no actions that adversely affected the County's ability to enforce state or county law, and the Band and its members had consistently complied with County zoning regulations and state traffic laws. *Id.* 19a. The court rejected the proposition that Band compliance "under protest" injured the County, as no legal precept supported the theory that "*compliance* with County law constitutes injury." *Id.* 20a (emphasis in original).

The County also alleged injury on the grounds that it might be subject to liability in a future lawsuit challenging its enforcement of civil regulatory laws against Band members on the Reservation. Because no such lawsuit has been filed (or threatened), the court found this "amorphous threat of future liability" insufficient to establish injury in fact. *Id.* 20a-21a.

Finally, the court rejected petitioners' arguments that the reservation boundary dispute had adversely affected the value of the real property interests within the reservation and that such an effect could fairly be attributed to the challenged conduct of respondents. *Id.* 21a-22a.

A unanimous panel of the Eighth Circuit Court of Appeals affirmed. Bank App. 2a. The court reviewed the district court's decision *de novo*, *id.* 4a, and found it had "correctly concluded that [petitioners] lacked standing." *Id.* 5a. The Bank's concerns regarding potential Band regulation did not establish injury in fact but at best "reflect speculative harms based upon the assumed future intent of the Band." *Id.* 6a. For its part, the County was "unable to point to any definite controversy that exists from the Band's purported expansion of tribal jurisdiction over the disputed portion of the reservation," and "presented no evidence that its ability to enforce state or local law on the reservation has been usurped or even affected by the Band's alleged intentions." *Id.*

The court reversed the district court in one respect: it held that the dismissal of the case should be without prejudice. *Id.* 6a-7a. The court subsequently denied petitions for panel and *en banc* rehearing. *Id.* 28a.

REASONS FOR DENYING THE PETITIONS

Petitioners do not challenge (and do not even discuss) the principles of standing applied by the district court and the court of appeals in this case. The sole issue presented is whether the lower courts properly applied these correctly stated legal principles to the particular facts of the case. This factually intensive issue does not warrant *certiorari* for three reasons.

First, petitioners fail to show that the lower courts' application of Article III's standing requirement in this case conflicts with any decision of this or any other court. Petitioners' observation that reservation disestablishment claims have been decided on the merits in other cases does not demonstrate any such conflict, since the resolution of a particular issue in one case does not demonstrate the issue is justiciable in another case.

Second, petitioners fail to show that the federal courts have had any difficulty applying Article III's standing requirement in reservation disestablishment cases. The lower federal courts' consistent application of the standing requirement in such cases does not present an important federal question warranting this Court's review.

Third, petitioners' claim that the lower courts misapplied the standing requirement in this case lacks merit. The lower courts' determination that petitioners failed, in response to respondents' summary judgment motion, to produce specific evidence of injury, is supported by the record and provides no basis for *certiorari*.

A. The Lower Courts' Decisions In This Case Do Not Conflict with Any Decision of This Court or Any Other Court.

Article III limits the "judicial power" of the United States to the resolution of "cases" and "controversies." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). The core component of standing is "an essential and unchanging part" of the case-or-controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a party must establish:

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167, 180-81 (2000); *Lujan*, 504 U.S. at 560-61.

The elements of standing are "an indispensable part of the plaintiff's case," and "must be supported in the same way as any other matter on which the plaintiff has the burden of proof, *i.e.* with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. In responding to a summary judgment motion, a plaintiff must set forth by affidavit or other evidence "specific facts" that demonstrate its standing. *Id.*

The mere existence of a statute that might someday be applied to a plaintiff is insufficient to confer standing. *E.g. Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 507 (1972) ("justiciable controversy does not exist where 'compliance with [challenged] statutes is uncoerced by risk of their enforcement'"); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*) (neither mere existence of statute nor generalized threat of prosecution creates Article III case or controversy), *cert. denied*, 531 U.S. 1143 (2001). Instead, a plaintiff must present "specific facts" showing a "realistic danger" that defendants will enforce their laws in a way that "directly injur[es]" the plaintiff. *Pennell v. San Jose*, 485 U.S. 1, 8 (1988); *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979).

Petitioners do not challenge, or even discuss, these principles. Instead, they argue the dismissal of this case conflicts with other cases in which reservation disestablishment claims were decided on the merits. However, the fact that a particular issue is justiciable in one case does not mean it is justiciable in every case in which it is raised. For example, the constitutionality of the Line Item Veto Act was justiciable in *Clinton v. City of New York*, 524 U.S. 417, 436 (1998), but not in *Raines v. Byrd*, 521 U.S. 811, 830 (1997), where plaintiffs did not establish a sufficiently concrete injury to demonstrate standing. Similarly, a challenge to a federal arbitration scheme was justiciable in *Thomas v. Union Carbide*, 473 U.S. 568, 579-81 (1985), but not in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1019-20 (1984), where the plaintiff did not allege it had been compelled to resort to arbitration.

The principal case on which petitioners rely here, *Rosebud Sioux Tribe v. Kneip*, 375 F. Supp. 1065 (D.S.D.

1974), *aff'd*, 521 F.2d 87 (8th Cir. 1975), *aff'd*, 430 U.S. 584 (1977), does not conflict at all with the decisions in this case. In that case a tribe sued to establish the continued existence of its reservation. The tribe alleged specific, concrete injury because state and county officials were "*exercising* both civil and criminal jurisdiction over [tribal] members." 375 F. Supp. at 1066 (emphasis added). As the district court explained in this case, *Rosebud* "involved explicit efforts by one sovereign to exercise particular powers beyond [its] lawful jurisdiction; [it] did not present abstracted concerns over reservation boundaries." Bank App. 25a-26a.

Similarly, in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 340-41 (1998), a tribe brought suit after a state agency issued a permit for a landfill within the historic boundaries of its reservation. The Bank (Pet. at 18) notes that the tribe did not pursue its request for an *injunction* on appeal, but this does not detract from the fact that specific state action – the issuance of the permit – had injured the tribe and gave it standing to sue.[3]

The only other reservation disestablishment case petitioners cite is *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972). In that case a city alleged three specific injuries from a purported expansion of federal and tribal jurisdiction over a disputed portion of a reservation: (1) loss of jurisdiction over Indians within city limits; (2) loss of "revenue derived from licensing the sale of alcoholic beverages"; and (3) impairment of contractual

3. The Bank also cites *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2nd Cir. 2003), *cert. granted*, 124 S. Ct. 2904 (2004). In that case, a tribe sued after a city imposed property taxes on tribal properties, purchased the properties at tax sales, recorded deeds, and started formal eviction proceedings. 337 F.3d at 144.

obligations relating to bonds and warrants backed by property tax revenues. County 8th Cir. App. 135-36. The record does not indicate that defendants disputed these allegations, and the court did not address standing or justiciability. In *Cass County v. United States*, 570 F.2d 737, 741 n.4 (8th Cir. 1978), the Eighth Circuit held *New Town* did not support an argument that a case or controversy existed because "[j]usticiability was never considered as an issue."

New Town provides no basis for a grant of *certiorari* in this case. First, because *New Town* was an Eighth Circuit case, it does not present a conflict between the circuits.[4] Second, because the plaintiff made specific, *undisputed* allegations of injury, the *New Town* court did not reach the issue presented in this case: whether petitioners substantiated their claims of injury when those claims were challenged in respondents' motion for summary judgment. Since the *New Town* court did not address this issue, there is no conflict. Third, because *New Town* does not discuss Article III standing, it does not set an affirmative precedent that standing exists in similar cases. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984).

Petitioners cite several other cases in which courts adjudicated challenges to particular tribal laws. The principal cases on which they rely are also Eighth Circuit cases, and thus do not establish the existence of a conflict between circuits. Moreover, because the plaintiff established specific injury from the particular tribal law being challenged in each case, there is no conflict with the holding in this case.

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4. In denying panel and *en banc* rehearing in this case, the Eighth Circuit necessarily determined that *New Town* did not present an *intra-circuit* conflict warranting further consideration.

In *Baker Elec. Co. v. Chaske*, 28 F.3d 1466, 1469 (8th Cir. 1994), a tribe contracted with a power producer to serve tribal facilities. When a state court upheld a competing producer's right to serve the facilities, the tribe enacted a utilities code to perpetuate its exclusive relationship with its preferred producer. *Id.* at 1470. The tribe enacted the code as part of a specific, longstanding effort to regulate the provision of electricity services to the competing producer's financial detriment. *Id.* at 1469-70. Thus, the competing producer was already suffering economic injury from the tribe's actions, and the tribe did not dispute its standing to challenge the code.

In *Northern States Power v. Prairie Island Mdewakaton Sioux Indian Community*, 781 F. Supp. 612, 613 (D. Minn. 1991), *aff'd*, 991 F.2d 458 (8th Cir. 1993), a tribe enacted an ordinance restricting plaintiff's nuclear waste shipments. After plaintiff challenged the ordinance administratively, the tribe formally resolved to enforce it. *Id.* at 614. The plaintiff delayed shipments of water samples because of the ordinance, risking fines and other adverse consequences. *Id.* at 616. The district court issued an injunction, finding plaintiff would be *irreparably harmed* if the ordinance remained in effect. *Id.* at 616-17. Because plaintiff showed irreparable harm, there was no question it had standing.

The two non-Eighth Circuit cases on which petitioners rely also do not conflict with the lower courts' decisions in this case. In *Wisconsin v. Baker*, 464 F. Supp. 1377, *aff'd*, 698 F.2d 1323 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983), a state challenged the application of a tribal hunting and fishing code to nonmembers. To establish its standing, the state alleged, and the defendant tribal officials did not dispute, that "upon defendants' direction, agents of the defendants

are *enforcing* the tribal conservation code, causing real and substantial injury to the plaintiff and those for whom it serves as trustee." 464 F. Supp. at 1380 (emphasis added). Similarly, in *Tenneco Oil Co. v. Sac & Fox Tribe of Indians of Okl.*, 725 F.2d 572, 574 (10th Cir. 1984), an oil and gas lessee challenged tribal ordinances purporting to regulate oil and gas leases. The lessee sued after the tribe *commenced enforcement proceedings* to cancel its lease under the ordinances. *Id.* No similar proceedings have been commenced – or threatened – in this case.

Finally, petitioners cite the Eighth Circuit's decision in *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994 (8th Cir. 1993), a case in which the Band had filed to suit to enable its members to exercise usufructuary rights on ceded lands. The Eighth Circuit permitted counties and landowners to intervene under Federal Rule of Civil Procedure 24(a) because their interests "might be impaired by the disposition" of the case. *Id.* at 997. The court reasoned that the litigation would determine the rights of Band members to hunt, fish and gather on the ceded lands, "including land the counties and landowners own," and *might* reduce the proposed intervenors' property values. *Id.* at 998. As the Eighth Circuit later observed, the court did not address Article III standing. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1299 & n.6 (8th Cir. 1996).

This case is different. Respondents are not suing for a declaration that the 1855 Reservation still exists, or that the Band has any rights or jurisdiction on petitioners' lands. Under Article III, the issue is not whether petitioners' interests "might be impaired" by the disposition of their own lawsuit, but whether the challenged actions of the defendants have caused an actual or imminent injury. On respondents' motion

for summary judgment it was not enough for petitioners to allege a possible injury; they had the burden to produce specific facts to substantiate the existence of a real injury caused by respondents. The lower courts' determination that they failed to meet this burden is not at all inconsistent with the Eighth Circuit's intervention decision in *Mille Lacs*.[5]

B. Federal Courts Have Had No Difficulty in Applying Article III Standing Requirements in Reservation Disestablishment Cases.

Because the petitions do not challenge the settled principles of standing on which the district court and court of appeals relied, they present, at most, a challenge to the application of those principles to the particular facts of this case. Petitioners make no showing, however, that this fact-bound issue warrants *certiorari*. There is no indication the lower federal courts have had difficulty applying the doctrine of standing to reservation disestablishment cases.

Reservation disestablishment claims have been adjudicated on the merits in cases in which the plaintiff established a concrete injury arising from the exercise of particular governmental authority premised on the existence or disestablishment of a reservation. In addition to *Rosebud*, *Yankton Sioux*, and *New Town*, *supra*, *see*, *Hagen v. Utah*, 510 U.S. 399 (1994) (state criminal prosecution); *Solem v. Bartlett*, 465 U.S. 463 (1984) (state criminal prosecution); *DeCoteau v. District Court*, 420 U.S. 425 (1975) (state child placement proceeding and state criminal prosecution); *Mattz v. Arnett*, 412 U.S. 481 (1973) (state seizure and forfeiture

5. Judge Bowman wrote the *Mille Lacs* intervention decision and was on the Eighth Circuit panel in this case.

of fishing equipment); *Seymour v. Superintendent*, 368 U.S. 351 (1962) (state criminal prosecution); *United States v. Webb*, 219 F.3d 1127 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001) (federal criminal prosecution); *United States v. Grey Bear*, 828 F.2d 1286 (8th Cir.), *vacated in other respects*, 836 F.2d 1088 (8th Cir. 1987) (*en banc*) (federal criminal prosecution); *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527 (D. Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir.), *cert. denied*, 459 U.S. 1070 (1982) (state enforcement of hunting and fishing laws); *United States v. Minnesota*, 466 F. Supp. 1382 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980) (state enforcement of hunting and fishing laws).

In contrast, the federal courts have held reservation disestablishment claims nonjusticiable where the plaintiff did not establish an actual or imminent injury from any particular governmental action. *See, e.g., Association of Property Owners/ Residents of Port Madison v. Individual Council Members of the Suquamish Tribal Council*, 79 Fed. Appx. 126, 2003 WL 22098043 (9th Cir. 2003) (unpublished) (general "threat of enforcement of Tribal laws or exercise of Tribal jurisdiction" insufficient to establish standing); *Cass County*, 570 F.2d at 741 (claim nonjusticiable where jurisdictional question presented in the district court "abstract and hypothetical"); *Brown-Outagamie-Oneida Jurisdiction Commission v. Powless*, No. 85-C-1052 (E.D. Wis. 1990) (Bank 8th Cir. App. 55-56) (claim nonjusticiable because plaintiffs "unable to point to any actual exercise of jurisdiction over fee patented lands by the tribe").

Petitioners do not suggest these courts have incorrectly applied standing principles in reservation disestablishment cases.

The consistent application of settled principles of standing in reservation disestablishment cases does not warrant *certiorari*.

C. The Lower Courts Did Not Err in Determining Petitioners Failed to Present Specific Evidence of Injury in Response to Respondents' Summary Judgment Motion.

Even if this Court were inclined to review the application of correctly stated standing principles to particular facts, there is nothing in the record to suggest the lower courts erred in applying those principles to the facts in this case.

1. Enforcement of State and Local Laws.

The County asserts an injury to its ability to enforce its laws. However, it failed to substantiate this claim with any specific examples where County law enforcement was affected by respondents' actions. When asked to provide such details, the County responded that its allegation was "not based upon any specific date, person, activity, event or location." Resp. 8th Cir. App. 80-81. The County Sheriff testified respondents have taken no actions that impaired public safety or his agency's ability to enforce state and local laws. *Id.* 102, 105-06, 108-11, 113, 118, 121. And, the County admitted it presently enforces the law "*without* regard to the 1855 Reservation boundaries or membership in the Mille Lacs Band." County 8th Cir. Br. at 47 (emphasis in original). The lower courts correctly concluded the County did not demonstrate an actual or imminent injury to its ability to enforce its laws.[6]

6. In *Virginia v. Hicks*, 539 U.S. 113, 120-21 (2003), this Court held a state suffered injury in fact from a state court judgment holding a state law unconstitutional, and therefore had standing to challenge the state court judgment in this Court. There is no similar judgment limiting County law enforcement in this case.

2. Enforcement of Band Laws.

The Bank claims injury from the *potential* application of Band laws to it. Although most Band laws were enacted nearly 20 years ago, Resp. 8th Cir. App. 168, 170, 213-14, *no* Band law has *ever* been applied to the Bank. For example, the business-licensing program developed under Band law applies only to businesses that do business with the Band. *Id.* 32-33 (¶¶ 4-9), 124 (¶ b), 127 (¶¶ 3-4), 186, 188, 191-95. Similarly, the Band has limited enforcement of its environmental laws to its own lands and members. *Id.* 151 (¶¶ 24-25), 198-201. As the district court found, "the Band has neither threatened nor demonstrated an intention to enforce its ordinances beyond its 4000 acres." Bank App. 17a.

The Bank submitted no evidence the Band intends, after 20 years, to begin applying its laws to the Bank. The Bank (Pet. at 8) quotes a passage from a 15-year-old political speech by a former Band Chief Executive, but the speech presented a program to re-purchase lands, not to assert jurisdiction over nonmembers. The Bank cites no evidence of any *current* Band intent to expand the enforcement of Band laws to nonmembers. And, despite the Bank's claim (Pet. at 11) that "the specter of Band regulation poses significant operational concerns to the Bank," the Bank submitted no evidence that the Band's statutes have had *any* impact on Bank operations. Specifically, the Bank made no claim that either the existence of the Band's statutes or the Band's position regarding the status of the 1855 Reservation has affected in any way who the Bank does business with, where it does business, the terms of any Bank loan or other transaction, the Bank's enforcement of any delinquent loan, the Bank's future business plans, or any other matter.

3. Property Values.

The Bank claims (Pet. at 13) the Band's alleged assertion of regulatory authority has caused a decline in property values. The most basic problem with this claim was the "utter paucity of admissible evidence" to support it. Bank App. 22a. The Bank's *only* evidence of diminished values was a two-and-a-half page affidavit from an appraiser, Roger Wagner. Bank 8th Cir. App. 427-30. The district court found this affidavit did not satisfy plaintiffs' burden under Federal Rule of Civil Procedure 56(e) to adduce specific facts establishing a genuine issue for trial. Bank App. 21a.[7]

The only "fact" underlying the opinion was a published advertisement identifying a piece of property as lying "outside the disputed boundaries." *Id.* The affidavit contained no empirical evidence comparing land values inside and outside the Reservation boundaries. *Id.* 21a-22a.

> Plaintiffs' "expert" offers nothing other than conjecture to show that verbal sparring over the 1855 boundaries has caused any devaluation or decline in real estate values. Mr. Wagner presents no data or quantification as to the actual lost value caused by the dispute, but merely offers his personal belief that some effect has occurred.

Id. 22a. The district court took notice of the fact that the 1855 Reservation includes Mille Lacs Lake waterfront and

7. *See Weisgram v. Marley,* 528 U.S. 440, 454 (2000) (expert opinion "not supported by sufficient facts to validate in the eyes of the law" cannot support jury verdict); *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209, 242 (1993) (expert testimony is "useful as a guide to interpreting market facts, but is not a substitute for them").

other highly desirable vacation, business and residential property; "[t]aking into account the historically strong interest in owning this lake front property, and the absence of evidence of so much as a single sale where proximity to Indian Country affected price," the court correctly found petitioners failed to demonstrate any injury or risk of future injury. *Id.*[8]

The Bank also points (Pet. at 14) to the affidavits of its Chairman, B. P. Allen. The affidavits do not claim property values *have declined*, but state in conclusory fashion that the Band's alleged assertion of regulatory authority "*will depress* the market value" of the Bank's property interests. Bank App. 58a (emphasis added). The prospective, contingent nature of Mr. Allen's assertion is underscored by his statement that the Bank intervened in this case to prevent negative impacts "which will result *if* the former 1855 reservation is found to exist along its original boundaries," or *if* the Band has the authority to license businesses within the area of the former 1855 reservation." *Id.* 58a-59a (emphasis added). Because the Band has not sought *any* relief in this case, these unsupported allegations do not establish an actual or imminent injury.

4. Controversy.

Finally, petitioners argue that because respondents are allegedly seeking to "resurrect" the 1855 Reservation, the disagreement over the Reservation's status is, by itself,

8. The County Commissioner who served as the County spokesperson for this litigation testified that property values have increased countywide in recent years, and that values within the 1855 Reservation have followed the *same*, *increasing* trend. Resp. 8th Cir. App. 67c.

enough to establish standing. However, the "presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Article III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). While a tribe's assertion of jurisdiction over nonmembers can undoubtedly have "real, practical consequence," *Hicks*, 533 U.S. at 383 (Souter, J., concurring), that does not mean a challenge to tribal jurisdiction or to the status of a reservation can be litigated in any case in which there is an abstract disagreement over tribal authority. Where, as here, there is no tribal action that has caused an actual injury to plaintiffs and no such injury is imminent, the "essential and unchanging" requirement of standing, *Lujan*, 504 U.S. at 560, has not been met.

CONCLUSION

The petitions for writs of *certiorari* should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FIRST NATIONAL BANK OF MILACA,
Petitioner,

v.

MELANIE BENJAMIN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONER FIRST NATIONAL BANK OF MILACA

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INTRODUCTION

Petitioner First National Bank of Milaca submits this reply to Respondents' Brief in Opposition. Respondents cannot effectively distinguish this Court's decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), where, in a context analogous to the case confronting Petitioners here, the parties involved had a sufficiently concrete stake to adjudicate a reservation boundary dispute. The briefs *amicus curiae* of the States of Minnesota, South Dakota and North Dakota, and from a township, city and landowners within the disputed area, further demonstrate the immediacy of the boundary dispute and the appropriateness of resolving the issue now.

ARGUMENT

I. THE BAND CONCEDES ITS INTENT TO EXERCISE JURISDICTION TO THE FULLEST EXTENT PERMITTED BY FEDERAL LAW.

Respondents assert that in the 20 plus years that various Band statutes have been in existence, there has not been any effort to regulate activities of the Bank. However, the letters the Band sent to businesses within the disputed area did not purport to limit the demand to register and pay a licensing fee solely to those doing business with Band members. The jurisdictional assertion was tied to doing business "on lands under the jurisdiction of the band." (Pet. App. at 60a.) Even the Band's responsible officer conceded that the letters reached to all businesses within the disputed area. (Pet. at 10.) Likewise, the Band's ordinances were conceded to apply on their face to this Bank. Indeed, Respondents do not address the fact that the Band's environmental statutes are expressly premised on the existence of the former 1855 reservation. (8th Cir. App. 210, 215.)

Band Chief Executive Melanie Benjamin conceded the Band intends to regulate as far as federal law allows. In their brief, Respondents likewise concede the Band asserts the

right to regulate within the former 1855 reservation if that area is "Indian country," "depending on who [sic] . . . is being regulated or the purpose of the regulation. . . ." Brief in Opposition at 2. Under *Montana v. United States*, 450 U.S. 544, 561 (1981), the power to regulate non-members extends to "what is necessary to protect tribal self-government," but only within the territory of a reservation. While *Nevada v. Hicks*, 533 U.S. 353 (2001), may presently limit tribal authority over non-members, as the recent decision in *United States v. Lara*, 124 S.Ct. 1628 (2004), indicates, Congress may be able to extend tribal power over non-members. Respondents do not dispute there is an active "*Hicks* fix" effort underway by various tribes to convince Congress to override *Hicks* under the guise of extending tribal self-government. Thus, the Bank has a bona fide concern over being subject to regulation by an governmental entity from which the Bank is wholly excluded.

II. THE PRECEDENT OF THE COURT AND OTHER APPELLATE COURTS DEMONSTRATES A NEED TO CLARIFY THE LAW OF STANDING IN THIS AREA.

Respondents attempt to distinguish two key boundary decisions of this Court by claiming that in *Rosebud* and *South Dakota v. Yankton Sioux Tribe*, 422 U.S. 329 (1988), there were explicit disputes over the state's power to regulate within the claimed reservation boundaries. Yet, in each case, the central issue was the existence of the reservation boundary, devoid of any ongoing enforcement proceeding. Similarly, in *City of New Town v. United States*, 454 F.2d 121 (8th Cir. 1972), there had not been any enforcement action; the Tribe did not dispute the need to resolve the boundary controversy.[1]

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[1] Likewise, there is no functional way to distinguish the interests of the Bank and County from the potential economic harm held sufficient to

Respondents argue that two Eighth Circuit cases also support the proposition that enforcement of a tribal ordinance is required before Article III standing exists. Respondents characterize *Baker Elec. Co. v. Chaska*, 28 F.3d 1466 (8th Cir. 1994), as conferring standing on one utility allegedly competitively disadvantaged by the tribal utility code. But evidence of actual economic harm is nowhere to be found in that decision. Similarly, in *Northern States Power v. Prairie Island Mdewakaton Sioux Indian Community*, 781 F. Supp. 612 (D. Minn. 1991), *aff'd*, 991 F.2d 458 (8th Cir. 1993), it was the possibility of tribal enforcement of a tribal ordinance that created a justiceable controversy, while the tribe's effort to avoid judicial resolution by eschewing immediate enforcement was rejected.

Respondents also cannot effectively distinguish this case from *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 998 (8th Cir. 1993), in which the Eighth Circuit held that because the landowners had interests in property located within the area where the Band was asserting hunting and fishing rights, and because those property interests could be adversely affected by the Band's actions, the landowners had a legally protectable interest. *Id.* at 998. The landowners were allowed to intervene as of right, which could only be allowed if they had standing, *see Mausolf v. Babbitt*, 85 F.3d 1295, 1299-1301 (8th Cir. 1996), simply because the Band claimed an as yet unexercised right to hunt on the landowners' properties. The rights the Band asserts here over the Bank are certainly more substantial than the unexercised usfructory right asserted in *Mille Lacs Band*, making the Bank's case for standing stronger.

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confer standing under this Court's general standing principles, as articulated *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). The regulatory apparatus the Band has enacted presents at least the same economic effects found sufficient to confer standing in *Gladstone*. *See* Pet. at 14.

Respondents' reliance on *Association of Property Owners/ Residents of Port Madison Area* [*APORPMA*] *v. Individual Council Members of the Suquamish Tribal Council*, Case No. C01-5317FDB (W.D. Wash. 2002), and *Brown-Outagamie-Oneida Jurisdiction Commission v. Powless* [*Brown*], No. 85-C-1052 (E.D. Wis. 1990), is misplaced. In *APORPMA* the plaintiffs could not point to *any* section of tribal code which purported "to define the boundaries of the Reservation or to assert that plaintiffs' properties lie within them." (8th Cir. App. 376.) Moreover, the plaintiffs in *APORPMA* could not direct the court to any Band regulatory statute that appeared to be applicable to the plaintiffs. (8th Cir. App. 376.)

Unlike *APORPMA*, the Bank seeks declaratory relief to restore the certainty that has been lost due to appellees' *own* unequivocal assertion that the reservation boundaries created by the 1855 Treaty were not disestablished. And unlike the plaintiffs in *APORPMA*, the Bank has identified numerous Band regulations which apply on their face to the Bank.

The *Brown* decision is similarly unpersuasive. In that case the court determined there was no justiciable controversy because the only allegation plaintiffs presented to the court was that the Oneida Tribe of Wisconsin had entered into a "Memorandum of Agreement" with the Wisconsin DNR and the United States EPA to develop environmental regulations for joint implementation within the Oneida reservation. (8th Cir. App. 54.) Because the environmental regulations had not yet been promulgated, the case was simply not ripe for review. (8th Cir. App. 55.) Here, however, the Band has gone far further and enacted—and expressed the intent to enforce to the extent allowed by federal law—numerous statutes that facially apply to the Bank and its customers. Indeed, as *amicus* State of Minnesota makes clear, the Band has convinced EPA to give it treatment as state status within the former 1855 reservation. This case, therefore, falls squarely within *Baker Electric* and *Northern States Power*.

III. RESPONDENTS' ANALYSIS OF STANDING DEMONSTRATES THE NEED FOR A DECISION CLARIFYING THE CONTOURS OF STANDING IN A BOUNDARY DISPUTE.

The Bank demonstrated more than a theoretical concern in the boundary dispute. It does a substantial share of its business within the affected area and does business with Band members that currently subjects it to the Band's consumer protection statutes. It presented more than sufficient impact for the dispute to have standing.

To follow the Band's characterization of the law in this area, a reservation boundary dispute is justiciable if a tribe presents the issue—Respondents' reading of *Rosebud* and *Yankton Sioux Tribe*—or if there is an actual enforcement action against a tribal member. Standing principles are not so one-sided, and this Court should grant certiorari to clarify that is the case.

CONCLUSION

Petition First National Bank of Milaca requests the Court grant its Petition for Certiorari to address this important question of federal law.

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Nos. 04-229 and 04-228

In The
Supreme Court of the United States

MILLE LACS COUNTY, MINNESOTA,

Petitioner,

v.

MELANIE BENJAMIN, et al.,

Respondents.

FIRST NATIONAL BANK OF MILACA,

Petitioner,

v.

MELANIE BENJAMIN, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF STATE OF MINNESOTA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF AMICUS INTEREST AND SUMMARY OF ARGUMENT

Minnesota has a strong interest in seeing that the dispute over the boundaries of the Mille Lacs Indian Reservation is judicially resolved. Therefore, it urges the Court to grant certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Minnesota agrees with Petitioners, Mille Lacs County (County) and First National Bank (Bank), that the Mille Lacs Indian Reservation consists of approximately 4,000 acres of trust land (land held in trust by the federal government for the Mille Lacs Band or its members). The Mille Lacs Band, with the agreement of the United States Department of Interior, asserts that the reservation includes the approximately 61,000 acres that composed the original reservation established by the 1855 Treaty between the United States and the Chippewa.

The dispute over the Mille Lacs reservation boundaries has unhappily pitted the State and its subdivision Mille Lacs County, against the Mille Lacs Band of Ojibwe for the last fifteen years. In the Lake Mille Lacs area, it has prompted consternation in newspaper editorials and intense disagreements between friends and neighbors. Co. Pet. App. 171a, 188a and 201a. Only the federal courts have the ability to end the quarreling among neighbors and determine whether the boundaries of the reservation, as set out in the 1855 treaty, continue to exist or not. In addition to ending contention between Band members and non-Band members living in the area, the State, for its own interest, would like the reservation boundaries issue resolved. The disagreement affects the State's ability to

implement its responsibilities under state and federal law in the disputed reservation area.

The State's inability to fully implement its laws because of the boundary dispute can be seen in two examples resulting from the management of environmental laws by the U.S. Environmental Protection Agency ("EPA"). The first is the "treatment as a state" process, while the second is the "state program authorization" process.

Under the treatment as a state provisions of the federal Water Pollution Control Act and the Safe Drinking Water Act, the Mille Lacs Band has asked the EPA for authority to apply tribal environmental laws in the disputed reservation area in lieu of EPA applying federal law. Although the State opposed the Band's application because of its reservation boundary aspects, the fact is that the treatment as a state administrative process of comment and an on-the-record review of EPA's decision does not allow for adequate presentation of the complex, historical evidence involved in reservation boundary disputes.

Likewise under the parallel state program authorization process, where a state asks EPA for approval to apply state environmental laws in lieu of EPA applying federal environmental laws, the State has been reluctant to apply for state program approval in the disputed Mille Lacs Reservation area. As with the treatment as a state process, the administrative program approval process is not designed to allow for a full presentation of the complex evidence necessary to analyze and interpret Indian treaties and Congressional enactments.

The Mille Lacs Reservation boundary dispute is an issue in both administrative processes, but evades adequate

adjudication. The proper forum for such adjudication is the federal courts. By granting *certiorari*, this Court can consider the arguments of the parties and then determine whether a controversy exists within the meaning of Article III, § 2 of the U.S. Constitution and 28 U.S.C. § 2201, and if so, return the case to the District Court for a trial on the merits.

For these reasons, the State of Minnesota files this brief in support of the Petition by the County and the Bank.

REASONS FOR GRANTING THE PETITION

I. The Notice and Comment Process For 'Treatment As A State' – Under Which The Mille Lacs Band Has Sought EPA Approval To Apply Tribal Environmental Laws To All Persons Within The Disputed Reservation – Is Not An Appropriate Forum For Resolving Complex Reservation Boundary Disputes.

Under the Water Pollution Control Act, the Safe Drinking Water Act, and the Clean Air Act, Indian tribes can apply to EPA for 'treatment as a state' to enforce tribal environmental laws in lieu of EPA applying federal environmental laws. *See* 33 U.S.C. § 1377(e) (2000) (Water Pollution Control Act); 42 U.S.C. § 300h-1(e) (2000) (Safe Drinking Water Act); and 42 U.S.C. § 7601(d) (2000) (Clean Air Act). Under these statutes and their implementing regulations, like a state, a tribe can apply to establish water quality standards, issue and enforce National Pollutant Discharge System (NPDES) permits, issue and enforce permits to dredge and fill in public

waters, regulate underground injection control systems, regulate management of sewage sludge, control non-point source pollution, enforce drinking water standards, and regulate various air quality sources. *See* 40 C.F.R. § 181.8 (2003) (water quality standards); 40 C.F.R. §§ 123.31-.32 (2003) (NPDES permits); 40 C.F.R. §§ 233.60-.61 (2003) (dredge and fill permits); 40 C.F.R. §§ 145.52-.53 (2003) (regulate septic systems); 40 C.F.R. §§ 501.22-.23 (2003) (regulate the management of sewage sludge); 40 C.F.R. § 130.6(d) and § 130.15 (2003) (control non-point source pollution); 40 C.F.R. §§ 142.72 (2003) (enforce drinking water standards); and 40 C.F.R. §§ 49.6-.7 (2003) (operate Clean Air Act programs).

To grant treatment as a state, EPA must find that the tribe has both jurisdiction over the geographic area for which it is applying as well as authority to enforce its laws over all persons within the area for which the tribe is applying for program authorization.[1]

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[1] The Water Pollution Control Act requires a showing that the functions to be exercised by the tribe pertain to management and protection of water resources that are "held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation." 33 U.S.C. § 1377(e)(2) (2000). The Safe Drinking Water Act requires a showing that "the functions to be exercised by the Indian tribe are within the area of the Tribal Government's jurisdiction." 42 U.S.C. § 300j-11(b)(1) (2000). EPA has interpreted these two statutes to require a showing of tribal jurisdiction over both the geographic area and the persons within the area for which the tribe is applying for treatment as a state. *See, e.g.*, 56 Fed. Reg. 64,876, 64,877-64,882 (1991) (interpreting the Clean Water Act requirements) and 53 Fed. Reg. 37,396, 37,399-37,400 (1988) (interpreting the Safe Drinking Water Act requirements.) The Clean Air Act requires a showing that "the functions to be exercised by the Indian tribe pertain to the management and protection of air

(Continued on following page)

Upon receipt of a tribe's application, EPA notifies the state and the public of the tribe's application and provides 30 to 45 days, depending on the particular EPA program, to comment on the jurisdictional aspects of the tribe's application, including any claim that the area for which the tribe is applying is not within the boundaries of the tribe's reservation.[2] *See*, 40 C.F.R. § 131.8(c) (2003) (establishment of water quality standards); 40 C.F.R. § 123.61(a) (2003) (NPDES permits); 40 C.F.R. § 233.15(e) (2003) (dredge and fill permits); 40 C.F.R. § 501.31 (sewage sludge management); 40 C.F.R. § 145.31 (2003) (regulation of septic system systems); 40 C.F.R. § 142.13 (2003) (enforcement of drinking water standards); 40 C.F.R. § 130.15 (2003) (nonpoint source management); and 40 C.F.R. § 49.9 (2003) (air quality programs).

When EPA makes a jurisdictional determination on a tribe's application for one EPA program, it will ordinarily

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resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." 42 U.S.C. § 7601(d)(2)(B) (2000). Although a tribe must show geographic jurisdiction, one court has held that the Clean Air Act constitutes an express delegation of authority by Congress to Indian tribes to regulate air resources within an Indian reservation. *See Arizona Public Service Co. v. E.P.A.*, 211 F.3d 1280 (D.C. Cir. 2000), *cert. denied by Michigan v. E.P.A.*, 121 S.Ct. 1600 (2001).

[2] For applications submitted before 1994, EPA had a separate prequalification process for treatment as a state. Tribes that obtained treatment as a state approval then applied for specific program approval. In 1994, EPA merged the treatment as a state determination into the program approval process so that a tribe now only submits one application. EPA also changed its terminology from treatment as a state to treatment of a tribe "in a manner similar to that in which it treats a State." *See* 59 Fed. Reg. 64,339 (1994). EPA recognized, however, that since the statutes use the term treatment as a state, use of that term may need to continue.

make the same determination for all other programs. *See* 59 Fed. Reg. 64,339, 64,340 (1994). With respect to the boundaries of a tribe's reservation, EPA has made it clear that once it decides a reservation boundary in one program application, it will not alter its position in a subsequent program application, unless there is significant new factual or legal information. *Id.*

Because of EPA's position on reservation boundary determinations, the first application of the Mille Lacs Band under the treatment as a state process was important to the State. The Mille Lacs Band first applied for treatment as a state in 1989 for the Underground Injection Control Program, involving regulation of septic tanks used to store sewage and some types of industrial waste. *See* 40 C.F.R. §§ 145.52-.53 (2003). The Band applied to regulate septic systems in the entire 1855 Treaty reservation area and asserted in its application that it had authority to regulate all persons, both Band members and non-members, within the disputed reservation area. The Minnesota Pollution Control Agency ("MPCA") opposed the Band's application, arguing in comments submitted to EPA that the boundaries of the 1855 reservation no longer existed.

In 1996, EPA approved the Band's application for treatment as a state for the Underground Injection Control Program. EPA found that the Mille Lacs Indian Reservation included the 60,000 acre reservation established under the 1855 Treaty. In response, the MPCA submitted additional comments to EPA, as did Mille Lacs County, Isle Harbor Township, and the City of Waukon (all located within the disputed reservation), and requested that EPA reconsider its decision. In 1998, in lieu of further proceedings, the MPCA, the Band, and EPA entered into a

Memorandum of Understanding (MOU), allowing EPA to continue to operate the federal program in the disputed area, with advice from both MPCA and the Band. The MOU is, however, only a temporary solution since it can be terminated on 30 days notice.

The reservation boundary dispute continues to be a real issue because of another Band application for treatment as a state in 1992, this time for the Non-Point Source Management Program under the Water Pollution Control Act. In that application, the Band again asserted that the reservation boundary was the 1855 Treaty boundary and that it had jurisdiction over all Band and non-Band members within this area. The MPCA again opposed the Band's application commenting to EPA that the boundaries of the original Mille Lacs Reservation no longer existed. EPA has not yet made a decision on the Band's application.

When reservation boundaries are in dispute, as they are with respect to the Mille Lacs Reservation, an administrative forum such as the treatment as a state process with a 30-day comment period is ill-suited to deciding issues as complex as the boundaries of an Indian reservation. Determining reservation boundaries involves interpretation of Indian treaties, federal statutes, and a broad range of historical documents, as well as extensive discovery and use of expert witnesses. These are tools not available to the parties in a 30-day comment period. In addition, any review of EPA's decision would likely be an on-the-record review, without the opportunity to further develop the issue on appeal. *See State of Montana v. E.P.A.*, 941 F. Supp. 945, 956 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 119 S.Ct. 275 (1998) (district court noted that review was on the record to

determine whether EPA's decision to grant treatment as a state to the tribe was arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law); *Wisconsin v. E.P.A.*, 266 F.3d 741, 750 (7th Cir. 2001), *cert. denied,* 122 S.Ct. 2347 (2002) (holding that EPA's grant of treatment as a state to the tribe was not arbitrary, unreasonable or contrary to law). Allowing the Mille Lacs boundary dispute to be resolved in federal court would permit this controversy to be decided in a forum capable of addressing the complexity of the issue.

II. The Unresolved Boundary Dispute Affects Minnesota's Ability To Obtain State Program Authorization From EPA And, Thus, To Fully Implement Its Environmental Laws Consistently Within The Disputed Area.

EPA's position on the Mille Lacs reservation boundary impacts the State's ability to receive state program authorization from EPA to operate state environmental programs in lieu of EPA enforcing federal environmental laws in Minnesota. State program authorization would allow Minnesota to consistently apply its environmental laws within the State.

Under most federal environmental statutes, a state can apply to EPA for approval of its state program to operate in lieu of EPA implementing federal environmental laws in the state. *See, e.g.,* 40 C.F.R. § 123 (2003) (state program application requirements for the NPDES permit program under the Water Pollution Control Act). To receive approval, a state must show that it has authority to regulate under each program applied for, and that its environmental laws are at least as stringent as federal laws. *See, e.g.,* 40 C.F.R. § 123.21, § 123.23, and § 125

(2003) (NPDES permit program). Minnesota has an extensive set of environmental laws regulating air, land, and water within the state that are administered by MPCA. *See* Minn. Stat. chs. 114C-116I (2002) and Minn. R. chs. 7000-7190 (2003). Showing that Minnesota's laws are as stringent as federal environmental laws is rarely a problem since Minnesota's environmental laws are often more stringent than federal laws. If EPA approves the state program, the state can apply its own environmental laws in lieu of EPA applying federal laws. Minnesota has received federal delegation for most programs under the major environmental statutes. This allows Minnesota to assure consistent enforcement of similar environmental protection standards throughout the state.

With respect to Indian reservations, EPA has taken the position that it will not grant program approval for a state to apply its laws on Indian reservations unless the state can show that it has jurisdiction over the entire reservation. *See, e.g.,* 58 Fed. Reg. 67,966, 67,978 (1993) (commenting on the final rule for the NPDES permit program, water quality certification program, and the sewage sludge management program); *see also* Memorandum from Dougherty, Cynthia C., Permits Division, to EPA Water Management Division Directors, *Guidance on EPA's NPDES and Sludge Management Permit Procedures on Federal Indian Reservations* 1 n.1 (Nov. 16, 1993) (where EPA states that although its regulations contemplate that a state may be able to demonstrate authority on Indian reservations, "the threshold for such a demonstration is very high, and, absent explicit Congressional authorization, it is unlikely that EPA would authorize a State to do so."). EPA considers the Mille Lacs Reservation to be the 60,000 acre 1855 Treaty reservation, relying on a 1991 opinion of the U.S. Department of the Interior's Office of the Field Solicitor. Co. Pet. App. 185a.

As a result of EPA's position on when it will authorize a state program to operate on an Indian reservation, the question of the size of the Mille Lacs Reservation becomes a critical issue. It is one which the MPCA must address each time it applies to EPA for new program authorization. In order to show that the State has jurisdiction, the MPCA has to prove to EPA that the Mille Lacs Reservation does not include most of the area within the original 1855 Treaty. MPCA's burden is made more difficult by having to prove disputed reservation boundaries within the constraints of a program application and by the fact that EPA's decision on the reservation boundaries would likely be subject to an on-the-record review. *See* 42 U.S.C. § 6976(b) (2000) (providing for review of EPA's decision to deny state program authorization in the court of appeals in accordance with the federal Administrative Procedures Act, 5 U.S.C. pts. 701-706); *see also State of Washington, Dept. of Ecology v. E.P.A.*, 752 F.2d 1465 (9th Cir. 1985) (reviewing EPA's decision to deny the State of Washington's application for hazardous waste program authorization to cover both Indians and non-Indians within Indian reservations in Washington).

Like the treatment as a state process, the state program approval process is not designed to allow for an adequate presentation of the complex, historical evidence intrinsic to an analysis and review of a number of Indian treaties, agreements, and Congressional enactments. Only a federal court can provide a forum adequate to decide a reservation boundary dispute.

Because of the inadequacy of the administrative process to resolve the reservation boundary dispute, the MPCA has reluctantly deferred applying for state program authorization within the disputed Mille Lacs reservation.

Instead, it has included language in its program applications to EPA preserving the State's position on reservation boundaries.[3]

As a consequence of the continuing boundary dispute and the difficulty of resolving it, non-Band members living within the disputed area may be subject to inspections by both EPA for compliance with federal environmental law and by the MPCA for compliance with state environmental law. *See* Co. Pet. App. 185a. Allowing the reservation boundary dispute to be heard and decided in federal court will provide an appropriate forum to resolve this issue.

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[3] For example, in the Underground Storage Tank Program application to EPA in 2000, MPCA included the following language: "This disagreement over the boundary of the Mille Lacs Indian Reservation is not, however, well suited for resolution in an administrative forum, which does not allow for adequate presentation of the complex historical evidence fundamental to an analysis and review of Indian treaty disputes. Thus, the Minnesota Pollution Control Agency (MPCA) will cooperate with EPA and allow EPA to continue to operate the Federal Underground Storage [Tank] Program within the area that the EPA describes as the Mille Lacs Indian Reservation, with the explicit written understanding that the MPCA's cooperation does not constitute a concession that EPA's position on the boundary is correct nor waiver of the state's right in the future to seek resolution of the boundary dispute in an appropriate forum." Also, when it granted law enforcement authority to the Mille Lacs Band concurrent with that of the state, the legislature expressly limited the statute so that it would not affect any dispute regarding boundaries or other matters. Minn. Stat. § 626.90, subd. 7 (2002).

CONCLUSION

For the reasons stated, Minnesota respectfully requests that the petition for writ of certiorari be granted.

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